ONTARIO

LEGISLATIVE ASSEMBLY

1973 REPORT ON MERGERS, AMALGAMATIONS AND CERTAIN RELATED MATTERS BY SELECT COMMITTEE ON COMPANY LAW

TABLED IN THE LEGISLATIVE ASSEMBLY BY

WILLIAM HODGSON, M.P.P.
CHAIRMAN

3rd SESSION, 29th LEGISLATURE, 22 ELIZABETH II

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LEGISLATIVE ASSEMBLY
SELECT COMMITTEE ON COMPANY LAW
REPORT
on
MERGERS, AMALGAMATIONS
and
CERTAIN RELATED MATTERS

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TO: The Honourable Allan E. Reuter,
Speaker of the Legislative Assembly of the Province of Ontario

Sir:

We, the undersigned members of the Committee appointed by the Legislative Assembly of the Province of Ontario on December 17, 1971 to enquire into and review, inter alia, the law affecting the corporations of this Province and, in particular, the law relating to mergers and amalgamations and the rights of dissenting shareholders in the event of various fundamental corporate changes, together with the legislation of other jurisdictions relating to the same, have now the honour to submit the attached Report on these subjects.

William Hodgson, Chairman

J. Albert Belanger

Leonard M. Reilly

Edward R. Good

James A. Renwick

Robert M. Johnston

Mrs. Margaret Scrivener

Patrick D. Lawlor

Vernon M. Singer

Arthur K. Meen

Gordon E. Smith

INTRODUCTION

The Committee was reconstituted on December 17, 1971. Under its revised terms of reference, the Committee was appointed:

> "to continue the enquiry and review of the law affecting the Corporations of this Province as reported on by the Select Committee of this House appointed on June 22, 1965, and re-appointed on July 8, 1966, and on July 23, 1968, and in particular to enquire into and review the law relating to mergers or amalgamations, the rights of dissenting shareholders in the event of various fundamental corporate changes, the purpose, function and scope of the annual return, the law relating to the protection of the creditor and the dissolution of the ordinary commercial corporation in Ontario.
>
> And further, to enquire into and report upon such specialized types of corporations as insurance companies, loan and trust companies, corporations without share capital, finance and acceptance companies, and extra provincial companies, together with the legislation of other jurisdictions relating to the same matters."

When appointed, the Committee was composed of eleven members—Mr. Meen (Chairman), Messrs. Clement, Good, Hodgson (York North), Johnston, Lawlor, Reilly, Renwick, Scrivener (Mrs.), Singer and Smith (Simcoe East). On June 30, 1972, Mr. Clement became Chairman of the Committee and Mr. Meen continued as a member of the Committee. On December 15, 1972, Mr. Hodgson became Chairman of the Committee and Mr. Allan was substituted for Mr. Clement in the membership of the Committee. On May 3, 1973, Mr. Belanger was substituted for Mr. Allan in the membership of the Committee.

In view of the breadth of the terms of reference of the Committee, the Committee again determined to examine and report upon a major topic included within its terms of reference.

Submissions were invited from interested persons and many meetings of the Committee were held during which the Committee heard oral evidence and received written briefs. In September, 1972, the Committee and its counsel spent one week in London, England, where much useful information was gained. We are much indebted to those persons in England who met with the Committee and imparted to the Committee the benefit of their knowledge and experience on the topics under consideration. In particular,

the Committee would like to record its indebtedness to Mr. M. A. Weinberg, the author of "Take-Overs and Mergers", to Registrar Berkeley, of the Companies Court, to Messrs. J. W. Mayo and F. H. Charlton, of Messrs. Linklater and Paines, to Professor Pickering, of the London School of Economics, to Mr. P. R. Frazer, Joint Secretary of the Panel on Take-overs and Mergers, to Messrs. P. A. R. Brown and C. E. Coffin, of the Insurance and Companies Branch of the Department of Trade and Industry, to Sir Hillary Scott, of Messrs. Slaughter and May, and to Messrs. Wright and Knight, of the London Stock Exchange.

The Committee also had the benefit of a paper prepared for it by Professor Frank Iacabucci, of the Faculty of Law of the University of Toronto, which was of great assistance to the Committee and its staff in its research into the topics under consideration.

The Committee also wishes to express its appreciation to Mr. Charles R. B. Salter, Executive Director of the Companies Division, and to Mr. Michael J. Gough, Senior Legal Officer of the Companies Division, for their expert advice and continuous assistance to the Committee and to Mr. H. S. Bray, Q.C., Vice-Chairman of the Ontario Securities Commission, and to Messrs. J. R. Kimber, Q.C., President, W. L. Somerville, Executive Vice-President, and Lester Lowe, Vice-President, Stock List, of the Toronto Stock Exchange for their advice and assistance to the Committee.

The Chairman and members of the Committee are very much indebted to Mr. J. W. Blain, Q.C. of Messrs. McCarthy & McCarthy for his guidance during its meetings. Mr. Blain has been Counsel to the Committee since 1968 and without his assistance this Report would not have been possible. Although the writing of this Report has been largely the responsibility of Mr. Blain, we would also like to express our appreciation to Mr. R. George Ness, Q.C. of Messrs. Ness & Winters, who has acted as Associate Counsel since 1971.

The Committee would also like to express their thanks to Mrs. Frances I. Nokes who has been secretary to the Committee since 1965 and to Mr. A. McFedries, Clerk of the Committee.

CHAPTER 1

General

1. Considerable confusion or inconsistency exists about the terms "merger", "amalgamation" and "consolidation". While a combination of two or more corporations through amalgamation is recognized in The Business Corporations Act[1], the terms "merger" and "consolidation" appear to have no definite legal meaning in Ontario. Confusion in terminology is perhaps created to some extent because of comparison with American practice. In the United States a merger is somewhat similar to the statutory amalgamation in Ontario, combining as it does two corporate entities into one, thereby vesting all of the assets and liabilities of the two corporations in the survivor and with all of the shareholders of each becoming shareholders of the one entity. A consolidation in American practice is the merger of two or more corporations into a third corporation, newly created for the purpose. Whatever legal meaning may be given to the terms, all seem to be used in a commercial sense as referring to some form of corporate combination which results in the blending in some manner of the businesses of two or more corporations either by the acquisition by one of the assets of another or the acquisition by one of control over the assets of the other through ownership of sufficient shares to exercise such control. Without wishing to add to the confusion of terminology, the Committee prefers the term "business combination", a term which reflects the practical result that in all cases two or more corporations have combined in some way.

2. In Ontario there are four methods by which a business combination may be effected:

(a) by the sale by one corporation of all or substantially all its property to another corporation for a consideration satisfied in cash or by the issue of securities by the purchasing corporation or by a combination of cash and securities; the selling corporation may then be wound up and the consideration received on the sale of assets distributed to the shareholders of the selling corporation or the selling corporation may continue as a holding corporation;

(b) by a statutory amalgamation under the provisions of section 196 of The Business Corporations Act as a result of which the amalgamating corporations are continued as one corporation possessing, by operation of the statute, all property, rights, privileges and franchises and subject to all liabilities, contracts, disabilities and debts of each of the amalgamating corporations;

(c) by an arrangement under sections 193, 194 and 195 of The Business Corporations Act;

(d) by the purchase by one corporation of shares of another corporation from the shareholders thereof; the consideration may be cash or securities of the purchasing corporation or a combination; such a combination may be effected by way of private agreement between the purchasing corporation and shareholders of the other corporation or by means of a take-over bid.

3. The exact form of a business combination is, in most cases, dictated by considerations other than those which may be loosely described as "corporate" considerations (i.e., the procedure, vote required, etc., to bring a business combination into effect). The tax implications to the corporations involved in a business combination are a significant factor and might well be the conclusive consideration in determining, say, if Corporation A will sell its assets to Corporation B or vice versa. The tax position of shareholders is also an important consideration and in general terms the tax treatment of shareholders under the various methods of effecting a business combination is different. In some cases one form of business combination may not be available at all since for all practical purposes the amalgamation provisions of The Business Corporations Act are only available when all of the amalgamating corporations are Ontario corporations. These and other considerations of a legal and business nature generally dictate the form the business combination will take.

4. In subsequent chapters the Committee examines separately the various forms of business combinations. The provisions of The Business Corporations Act govern the type of business combination referred to in clauses (a), (b) and (c) of section 2 of this chapter; the legislation governing the purchase of shares by private agreement or by means of a take-over bid is found in The Securities Act[2]. Since the take-over bid is such an important method of effecting a business combination, the Committee has also considered the relevant provisions of The Securities Act.

5. For ease of reference throughout this report, The Business Corporations Act will be referred to as the "Act", The Securities Act as the "Securities Act" and the Companies Act, 1948, of the United Kingdom as the "English Act".

1. R.S.O., 1970, c. 53, as amended.
2. R.S.O., 1970, c. 426, as amended.

CHAPTER 2

Sale and Purchase of Assets

1. As stated in chapter 1, a business combination can be effected as a result of the sale by one corporation of all or substantially all of its property to another corporation. The consideration for the sale may be cash or shares or other securities of the purchasing corporation or a combination. If the consideration is entirely cash one may question whether the transaction is truly a business combination — the business of both the vendor and purchaser have been combined, but the shareholders of the vendor will not be participants in the combined venture. The same reasoning might well apply if the consideration for the sale is shares of the purchasing corporation which are retained by the vendor and not distributed to its shareholders although in this case there is at least an indirect participation in the combined venture by the shareholders of the vendor corporation. In any event and no matter what the consideration may be, the procedure for the sale by a corporation of its property as an entirety or substantially as an entirety is the same. Because of the tax implications, not only with respect to the sale of assets but also in relation to any distribution of the consideration received to the shareholders of the vendor corporation, a sale of assets as a means of effecting a business combination is probably not as widely used as some of the other forms.

2. Section 15(2)17 of the Act provides that a corporation has power as incidental and ancillary to the objects set out in its articles

> "17. where authorized to do so by a special resolution and by such additional authorization as the articles provide, to sell, lease, exchange or otherwise dispose of all or substantially all the property of the corporation for such consideration as the corporation thinks fit;".

Special resolution is defined in section 1(1)27 of the Act to mean a resolution that is not effective until it is

> "i. passed by the directors of a corporation, and
>
> ii. confirmed, with or without variation, by at least two-thirds of the votes cast at a general meeting of the shareholders of the corporation duly called for that purpose, or such greater proportion of the votes cast as the articles provide, or, in lieu of such confirmation, by the consent in writing of all the shareholders entitled to vote at such meeting or their attorney authorized in writing;".

3. The Committee has given consideration to the vote of shareholders which should be required to authorize the sale by a corporation of all or substantially all its property. While the formalities that should be imposed

upon the board of directors of a corporation in connection with the management of its affairs should be minimized to ensure adequate flexibility in the conduct of the corporation's affairs, it seems obvious that a sale of all or substantially all the property of a corporation is a step which should not be left to the discretion of the board of directors or management of a corporation but should take place only after an appropriate approval by the shareholders. A fairly substantial majority should be required but the vote should not be unduly onerous. Whatever percentage vote may be selected would represent the selection of an arbitrary figure.

4. The Act has proceeded on the basis that a corporation may by special resolution effect various fundamental changes, such as the amendment of its articles [1], an amalgamation[2] and a sale of its property as an entirety or substantially as an entirety. There is in the opinion of the Committee no compelling reason why the sale of the property of a corporation as an entirety or substantially as an entirety should require any greater percentage vote of the shareholders than the vote required to amend the articles and no compelling reasons were advanced to the Committee that there should be any change in the present requirements.

5. It seems clear, from the definition of special resolution contained in the Act, that the holders of special shares of a corporation which do not carry a right to vote at the time a meeting is held to authorize the sale by a corporation of its property as an entirety or substantially as an entirety would not be entitled to vote thereon. Special shares may be issued which are non-voting under all circumstances or which acquire a vote only upon the happening of a contingency and, until such contingency occurs, such special shares are non-voting. The Committee has considered whether or not the holders of all shares of a corporation, including special shares which are either non-voting or which at the time do not carry a right to vote, should be entitled to vote on a special resolution to authorize the sale of the property of the corporation. The rights and powers of various classes of shareholders inter se and with respect to the corporation itself are usually matters that are arranged with some care, particularly with respect to the right to vote. In acquiring special shares in a corporation a person should be expected to accept the responsibility for the power or vulnerability that attaches to the class of special shares which he acquires. If a shareholder acquires non-voting special shares or special shares with limited voting rights, he should be expected to accept the voting weakness which attaches to such shares. If the Committee were to interfere with the voting rights or lack of voting rights attaching to special shares in the case of the sale of the property of a corporation, it would be logical to assume that there may be other areas where the same tampering should take place which, in effect, could change such special shares into voting shares. In these circumstances, the Committee has concluded that holders of special

shares who would not otherwise be entitled to vote at a meeting ought not to have this privilege granted to them in the case of the sale of the property of a corporation.

6. When one turns to the converse of the sale of property, i.e., a corporation purchasing as a whole or substantially as a whole the property of another corporation, one finds a substantial simplification of the formalities. The power of a corporation to acquire the property of another corporation as an entirety or substantially as an entirety is found in section 15(2) of the Act which reads as follows:

> "(2) A corporation has power as incidental and ancillary to the objects set out in its articles,
>
> 2. to acquire or undertake the whole or any part of the business, property and liabilities of any person carrying on any business that the corporation is authorized to carry on;".

Authorization by special resolution is not required and it would seem that the only formality required of the purchasing corporation is a resolution of its board of directors. Section 15(2)2 would seem to limit the right of a corporation to purchase all of the property of another corporation to those circumstances where the vendor is carrying on any business that the purchasing corporation is authorized to carry on. Because the objects for which a corporation is incorporated seem to be assuming less and less importance[3], the Committee considers that this limitation in section 15(2)2 serves no useful purpose and should be deleted.

7. The Committee has considered whether shareholder approval should be required when a corporation acquires the property of another corporation as a whole or substantially as a whole, particularly where the consideration to be given by the purchasing corporation consists of shares or other securities. A purchase is different from a sale. Where a corporation sells its property as a whole or substantially as a whole it is parting with its earning capacity and shareholders ought properly to be consulted. Where a corporation purchases the property of another corporation as a whole or substantially as a whole it is not parting with its earning capacity but rather, hopefully, adding to it. A general requirement for shareholders approval to any acquisition of property, whether or not such property represented the whole or substantially the whole of the property of another corporation, would be unduly restrictive on management. If such a requirement is imposed, it would of necessity have to be based on the size of the transaction. But where does one draw the line, particularly if the acquisition is for cash? Should shareholder approval be required only if the acquisition is for shares of the purchasing corporation and is this basically different from an acquisition for cash? On balance, and in view of the

difficulties which are involved, the Committee has decided there should be no requirement for shareholder approval where a corporation purchases the property of another corporation as a whole or substantially as a whole.

1. The Act, section 189(2).
2. The Act, section 196(4).
3. See Bill C-213, an Act respecting Canadian business corporations.

CHAPTER 3

Sale of Assets By Way of Arrangement

1. Section 193 of the Act deals with an arrangement between a corporation and its shareholders or the holders of a particular class of shares of the corporation. Section 193(1)(d) defines an arrangement as including:

> "(d) a reconstruction under which a corporation transfers or sells, or proposes to transfer or to sell, to another body corporate the whole or a substantial part of its undertaking for a consideration consisting in whole or in part of securities of the other body corporate and under which it proposes to distribute a part of that consideration among its shareholders of any class, or to cease carrying on its undertaking or that part of its undertaking so transferred or sold or so proposed to be transferred or sold.".

2. It would appear that the kind of arrangement referred to in section 193(1)(d) involves a transaction similar to the sale of property contemplated by section 15(2)17, but section 193(1)(d) may have a narrower application. The arrangement referred to must be a "reconstruction". The term reconstruction may perhaps not be a technical term but as a result of certain decisions[1], it seems to have acquired a particular meaning as it relates to a transaction involving the sale by a corporation of all or substantially all of its undertaking. Simonson says at page 9 of his text[2], after reviewing the authorities "that a transfer by a company is called a reconstruction, where the transfer comprises the undertaking (but not necessarily *all* the assets or liabilities) of the company and such transfer is made by *one* company to a *new* company, which is formed for the purpose of taking such transfer and which is practically the same company as the transferring company with some alterations in its constitution, in consideration of shares in such new company, which are allotted or at least offered to the members of the transferring company.". If this is the meaning to be given to the term reconstruction as used in section 193(1)(d), the particular type of arrangement there referred to is indeed of narrow application.

3. Although the courts have held that the term "arrangement" should be interpreted widely[3], it would seem, having regard to section 193(2) of the Act, which reads as follows:

> "(2) Subject to section 195, a corporation may make an arrangement,
> (a) that affects the rights of all of its shareholders; or
> (b) that affects the rights of only holders of a particular class of its shares."

that arrangements are generally restricted to intra-corporate reorganizations and reclassifications and variations of capital and the like. If this

view is correct it strengthens the conclusion that the term "reconstruction" should be interpreted in the manner referred to in paragraph 2 as being, in effect, an intra-corporate reorganization.

4. If, however, the term reconstruction is not given the narrow meaning above referred to and section 193(1)(d) can be construed as including any sale of the whole or a substantial part of the undertaking of a corporation within the circumstances set out in that section, then the Act has different requirements covering the same type of transaction. Under the arrangement sections the vote required is three-quarters of the shares of each class represented at the meeting and an application must be made to the court for approval of the scheme. If the same transaction were carried out pursuant to the power given by section 15(2)17, the vote required is less and no application to the court is necessary. The evidence before the Committee indicated that in almost all cases involving the sale by a corporation of the whole or substantially the whole of its property the provisions of section 15(2)17 were used to the exclusion of the arrangement sections.

5. The situation should be clarified and the Committee recommends that sub-section (d) of section 193(1) should be repealed so that all sales of assets will be governed by section 15(2)17. The Committee feels that no harm will be occasioned by such repeal. A reconstruction of the narrow type referred to in paragraph 2 will, if it ever arises, undoubtedly be construed by the courts as an arrangement even though subsection (d) has been repealed.

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1. Hooper v. Western and Countries, etc. Co., 41 W.R. 84; Re: South African Supply and Cold Storage Co. (1904) 2 Ch. 268 at 286.
2. Simonson: The Law Relating to the Reconstruction and Amalgamation of Joint Stock Companies (4th Ed.).
3. Re: West Humber Apartments Ltd. (1969) 1 O.R. 229.

CHAPTER 4

Amalgamation

General

1. Section 196(1) of the Act provides that any two or more corporations, including holding or subsidiary corporations, may amalgamate and continue as one corporation. The corporations proposing to amalgamate are required to enter into an agreement for the amalgamation prescribing the terms and conditions of the amalgamation and the mode of carrying the amalgamation into effect and such agreement must set out the matters specified in section 196(2) of the Act. The amalgamation agreement is not effective until approved by a special resolution of each of the amalgamating corporations[1]. Where the carrying out of the amalgamation agreement would result in the deletion or variation of a preference, right, condition, restriction, limitation or prohibition attaching to a class of issued special shares of any of the amalgamating corporations or in the creation of special shares of the amalgamated corporation ranking in any respect in priority to, or on a parity with, any existing class of special shares of any of the amalgamating corporations, the amalgamation agreement is not effective until it is approved by the holders of the class or classes of special shares so affected in the manner provided by subsection (4) of section 189 of the Act in addition to the approval required by special resolution[2].

2. To bring the amalgamation into effect, the amalgamating corporations must, within six months after the amalgamation agreement has become effective, deliver to the Minister articles of amalgamation setting out the information prescribed in section 197(1) of the Act, including a certified copy of the amalgamation agreement. The articles of amalgamation must be accompanied by evidence that establishes to the satisfaction of the Minister that each of the amalgamating corporations is not insolvent and, if required by the Minister, a pro forma balance sheet after giving effect to the proposed amalgamation[3]. If the articles of amalgamation conform to law, the Minister is required to issue to the amalgamated corporation or its agent a certificate of amalgamation[4]. Upon the issue of such certificate, the amalgamation becomes effective.

3. The amalgamation agreement must be approved by a special resolution of each of the amalgamating corporations before it is effective[5]. The vote of shareholders required in respect of an amalgamation agreement is thus the same as that required to authorize the sale by a corporation of all or substantially all its property. For the reasons given in chapter 2, the Committee is of the opinion that no change need be made in such voting requirements.

4. Section 196(5) of the Act contemplates that, under the circumstances there set out, the votes of the holders of special shares or of a class of special shares may be necessary before an amalgamation agreement becomes effective, in addition to the approval by special resolution. This subsection gives the holders of special shares a right to vote, in certain circumstances, in respect of an amalgamation agreement where they might otherwise not have such a right. The events which under section 196(5) give rise to a right to vote on the part of holders of special shares are those which affect the conditions attaching to the special shares or the priority which those shares enjoy. By their nature they are such that they could not be the subject of amendment to the articles of a corporation without the favourable vote of the holders of the special shares, given as provided in section 189(4). The Committee is of the view that no change should be made in the provisions of section 196(5). It follows, by implication, that if the amalgamation agreement does not have the effect of deleting or varying any preference attaching to a class of issued special shares or in the creation of special shares ranking in priority to or on a parity with any existing class of special shares of any of the amalgamating corporations, the right of the holder of special shares to vote on the amalgamation agreement is governed by the provisions attaching to those shares. Again, for the reasons set out in chapter 2, the Committee is of the opinion that holders of special shares who would not otherwise be entitled to vote at a meeting ought not to have this privilege granted to them in the case of an amalgamation agreement.

5. Section 196(2)(i) of the Act requires that the amalgamation agreement set out "whether or not the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and, if not, a copy of the proposed by-laws of the amalgamated corporation". To bring the amalgamation into effect, articles of amalgamation must be filed with the Minister and must set out, among other things, a certified copy of the amalgamation agreement.[6] The combination of these two requirements can have the result, in the event the by-laws of one of the amalgamating corporations are not to be those of the amalgamated corporation, of having the by-laws of the amalgamated corporation on file in a public office. By-laws are not filed on incorporation and the Committee knows of no reason why there should be such a requirement in respect of an amalgamation. The Committee therefore recommends that the Act be amended in such a way that the by-laws of an amalgamated corporation are not on file in the office of the Minister.

6. Section 197(2) of the Act requires that the articles of amalgamation shall be accompanied by evidence that establishes to the satisfaction of the Minister that each of the amalgamating corporations is not insolvent. The Regulations[7] provide that evidence that the corporation is not insolvent shall consist of affidavits of two officers or of one officer and one director

stating that in their opinion the corporation is not insolvent within the meaning of subsection (7) of section 1[8] of the Act and such other evidence as the Minister may require. While there may be some justification for requiring the amalgamated corporation to be solvent, there seems to be no compelling reason for requiring each of the amalgamating corporations not to be insolvent. There may well be cases where a corporation which was not solvent within the meaning of the definition of insolvency contained in the Act could be resurrected by an amalgamation. The Committee therefore recommends that section 197(2) of the Act be amended to provide that the articles of amalgamation be accompanied by the evidence now required that establishes that the amalgamated corporation is not insolvent and that no such evidence need be provided in the case of the amalgamating corporations.

7. Section 196(3) of the Act provides that, where shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations, the amalgamation agreement shall provide for the cancellation of such shares upon the amalgamation becoming effective without any repayment of capital in respect thereof, and no provision shall be made in the agreement for the conversion of such shares into shares of the amalgamated corporation. Section 39 of the Act now specifically permits a corporation, where authorized in its articles and subject to any restrictions contained therein, to purchase any of its issued common shares. Common shares so purchased are not necessarily cancelled but may under certain circumstances be resold[9]. There would not appear to be any justification for requiring inter-corporate shareholdings on an amalgamation to be cancelled. It should be optional with the amalgamating corporations to determine if inter corporate shareholdings should be cancelled or converted into shares of the amalgamated corporation which could then be treated the same as if the amalgamated corporation had purchased such shares. The Committee recommends that an appropriate amendment be made to section 196(3) of the Act to so provide.

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1. The Act, section 196(4).
2. Subsection (4) of section 189 of the Act provides

"(4) If the amendment is to delete or vary a preference, right, condition, restriction, limitation or prohibition attaching to a class of special shares or to create special shares ranking in any respect in priority to or on a parity with an existing class of special shares, then, in addition to the confirmation required by subsection (2), the resolution is not effective until it has been confirmed,

(a) by 100 per cent of the holders of the shares of such class or classes of shares in writing; or

(b) in writing by at least 95 per cent of the holders of the shares of such class or classes of shares holding at least 95 per cent of the issued shares of such class or classes and after twenty-one days notice of the resolution and confirmation has been given by sending the notice to each of the holders of shares of such class or classes to his latest address as shown on the records of the corporation and only if at the expiration of twenty-one days none of the holders of such class or classes has dissented in writing to the corporation; or

(c) if the articles so provide, by at least two-thirds of the votes cast at a meeting of the holders of such class or classes or shares duly called for that purpose or such greater proportion of the votes cast as the articles provide,

and by such additional authorization as the articles provide.".

3. The Act, section 197(2).
4. The Act, section 197(3).
5. The Act, section 196(4).
6. The Act, section 197(1)(b).
7. R.R.O. 1970, Regulation 78, as amended, section 31.
8. Section 1(7) of the Act provides
   "(7) For the purposes of this Act, a corporation is insolvent if its liabilities exceed the realizable value of its assets or if the corporation is unable to pay its debts as they become due.".
9. The Act, section 40(2).

CHAPTER 5

Amalgamation

The Effect of an Amalgamation

1. The Act states, in effect, that upon the date set forth in the certificate of amalgamation the amalgamating corporations are amalgamated and continue as one corporation. More specifically subsection (4) of section 197 and section 200 of the Act provide that:

"(4) Upon the date set forth in the certificate of amalgamation,

(a) the amalgamation becomes effective and the amalgamating corporations are amalgamated and continue as one corporation under the terms and conditions prescribed in the amalgamation agreement;

(b) the amalgamated corporation possesses all the property, rights, privileges and franchises and is subject to all liabilities, contracts, disabilities and debts of each of the amalgamating corporations;

(c) the issued capital of the amalgamated corporation is, subject to the decrease provided for in subsection (3) of section 196, equal to the aggregate of the issued capital of each of the amalgamating corporations immediately before the amalgamation becomes effective; and

(d) the articles of incorporation of each of the amalgamating corporations are amended to the extent necessary to give effect to the terms and conditions of the amalgamation agreement.

200. All rights of creditors against the property, rights and assets of a corporation amalgamated under section 196 . . . . and all liens upon its property, rights and assets are unimpaired by such amalgamation . . . . and all debts, contracts, liabilities and duties of the corporation thenceforth attach to the amalgamated . . . corporation and may be enforced against it."

2. These sections, which seem clear enough on the surface, raise many difficult problems particularly about the continued existence, or lack of existence, of the amalgamating corporations. Is the effect of an amalgamation to create a new corporation with the amalgamating corporations disappearing or is an amalgamation a continuation of the amalgamating corporations in an amalgamated form and if so what then is the entity or identity of the amalgamating corporations. The difficulties may best be summarized in the language of Arnup J. A. in Re Black and Decker Manufacturing Company, Limited and the Queen [1973]2 O.R. 460

at 463, where he says, in commenting on the substantially similar amalgamation provisions of the Canada Corporations Act[1],"Puzzling questions of great difficulty are raised by this section and particularly from the expressions "continue as one company" . . . . . "the amalgamating companies are amalgamated and are continued as one company" and the use of the word "possesses" in relations to rights and assets, rather than any words indicating a "transfer".".

3. In a fairly recent case[2] involving a prosecution under the Combines Investigation Act, one of the accused corporations was amalgamated under the provisions of The Corporations Act with two other corporations. In that case Jessup J. (as he then was) concluded that the amalgamated company in whose entity the amalgamating companies continue is a separate legal entity and that the amalgamating companies cease to have entity or identity once the amalgamation is accomplished. He also concluded that the term "liabilities" cannot be taken to include criminal liabilities which would involve ultra vires legislation by the Province on a matter of criminal law. He accordingly directed the acquittal of that particular accused.

4. Re Black and Decker Manufacturing Company, Limited and the Queen (supra) again involved a prosecution under the Combines Investigation Act. There had been an amalgamation of three companies under the substantially similar amalgamation provisions of the Canada Corporations Act. The information was laid against the amalgamated company in respect of an offence which, if committed, had been committed by one of the amalgamating companies. The Court of Appeal held that subsection 13(b) of section 137 of the Canada Corporations Act in making the amalgamated company subject to all of the liabilities of each of the amalgamating companies did not impose upon the amalgamated company a criminal liability of one of the amalgamating companies.

5. In Witco Chemical Co., Canada, Ltd. v. Town of Oakville et al, [1973] 2. O.R. 467, an amalgamation became effective on December 30, 1971. On December 31, 1971 a writ was issued on behalf of one of the amalgamating companies as plaintiff against the town of Oakville and its Public Utilities Commission for negligence in the maintenance of the municipal water works. When the plaintiff's solicitors realized the oversight that had occurred, they moved to amend the style of cause by changing the name of the plaintiff to the amalgamated company. After the writ was issued and before the motion was made, the limitation period under the Public Utilities Act expired. In Black and Decker the Court was required to consider the position of the amalgamated corporation only; in Witco it was required to consider the position of one of the amalgamating companies and specifically if it existed when the writ was issued. At page 470 Arnup J. A. says "The amalgamation provisions of the Ontario statutes,

like those in the federal statutes, are exceedingly difficult to understand both as to what happens to the corporations that enter into the amalgamation, and what is the relationship, if any, of those amalgamating corporations to the corporate creature that emerges as a result of the amalgamation". Arnup J. A. perhaps pinpointed the difficulty facing the Court when he said at page 471 " . . . . it is still not clear to me exactly what the legislation intended by providing that the old (amalgamating) companies continue as one corporation". He concluded his judgment with the following remarks "In short, for whatever purpose an amalgamating company continues to exist, without assets, liabilities, capital or shares, but with amended articles of incorporation, it does not exist for the purpose of issuing a writ for a cause of action which arose prior to the amalgamation."

6. The Committee is concerned that so many difficulties seem to exist about the effect of an amalgamation. It would not appear to the Committee to make any difference whether one says the old corporations continue or a new corporation is created so long as the practical legal effect is stated to be that the amalgamated corporation is the successor by operation of the law to all the assets and liabilities of the amalgamating corporations. The statute should be precise in stating the effect of the amalgamation so as to eliminate the doubts that seem to have arisen and which may in the future cause needless litigation. The Committee is satisfied, for instance, that the intention of the legislature was to treat the perpetuation of criminal liability as being an incident of amalgamation just as much as the perpetuation of civil liability. It was never a part of the legislature's intention, in the opinion of the Committee, that the device of statutory amalgamation should enable corporations to escape their legal liabilities, — whether such liabilities were civil or criminal in nature.

7. The Committee is therefore of the opinion that section 197(4)(b) should be so amended as to make it quite clear that the amalgamated corporation is subject to all the criminal liabilities and quasi-criminal liabilities of each of the amalgamating corporations. It was suggested by Jessup J. (as he then was) in the Beamish case that such an amendment would be ultra vires the Province as being a matter of criminal law. While the Committee would hesitate to disagree, it would seem to the Committee that providing for the amalgamated corporation to succeed to criminal liabilities might be justified on the basis that what the Province is doing is legislating with respect to the status of one of its creatures and the nature and effect of amalgamation rather than with respect to criminal law. Certainly the Committee feels that, whatever the eventual outcome of the constitutional argument, the legislature's responsibility to evolve the best in corporation jurisprudence necessitates the making of every effort to enact effectively the proposed amendment. If there is doubt about the constitutionality of provincial legislation for this purpose, the Committee

recommends that discussions should be held with the federal authorities with a view to the enactment of complementary legislation. A corporation should not be able to escape criminal liability by the simple expedient of amalgamation.

8. The Committee is also concerned, in view of the decision in the Witco case, with the continuation of civil liabilities and rights. Although the Witco case dealt with the fact the writ was issued, after the amalgamation became effective, on behalf of one of the amalgamating corporations as plaintiff, it would seem that the result would probably have been the same if an amalgamating corporation had been named as defendant after an amalgamation became effective. The Committee therefore recommends that the Act be amended to provide that any civil action commenced by or against an amalgamating corporation after an amalgamation has become effective is as valid as if such action had been commenced by or against the amalgamated corporation.

1. R.S.C. 1970 c. C-32, as amended, section 137.
2. R. v. J. J. Beamish Construction Co. Ltd. (1967) 59 D.L.R. (2d) 6, affirmed on other grounds (1968) 65 D.L.R. (2d) 260.

CHAPTER 6

Amalgamation

"Short Form" Amalgamation

1. Section 196 of the Act permits the amalgamation of a parent with its subsidiary. Any such parent-subsidiary amalgamation is subject to all the provisions of the Act relating to amalgamations including the required meetings of shareholders. The Committee has considered whether or not there should be a more streamlined form of amalgamation procedure in the case of the amalgamation of a parent company with its subsidiary.

2. Under certain of the state jurisdictions in the United States, there is a special procedure dealing with the merger (basically, in the United States, an amalgamation) of a subsidiary into its parent. Stated briefly, this procedure by-passes the requirements of a shareholders meeting and allows the merger to take place by the affirmative approval of the directors of the corporations. It should be noted, however, that the so-called "short form" merger has not received universal acceptance in the United States and has been the subject of some criticism.

3. Valid arguments can be advanced that there should be no "short form" amalgamation procedure where a parent proposes an amalgamation with a subsidiary which is not wholly-owned. In such circumstances, the minority shareholders of the subsidiary, even though they may be outvoted by the voting power of the parent, are nevertheless entitled to all of the information respecting the amalgamation, and an opportunity to express their views at a meeting, to the same extent as if the amalgamation were between unrelated companies. However, the situation appears to be different if the amalgamation is between a parent and a wholly-owned subsidiary. There are no outside shareholders of the subsidiary, no new shareholders will be introduced and it would seem an unnecessary burden to put the parent, particularly if it is "offering its securities to the public"[1], to the expense of calling a meeting of its shareholders. Equally, it seems to the Committee that no useful purpose is served by the requirement for a meeting of shareholders if the amalgamation is between two or more corporations wholly-owned by the same parent.

4. The Committee therefore recommends that the Act be amended to provide for a streamlined amalgamation procedure which would not require the approval of shareholders in the case of the amalgamation of a parent corporation with its wholly-owned subsidiary or between two or more wholly-owned subsidiaries of the same parent corporation.

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1. The Act, section 1(9).

CHAPTER 7

Amalgamation

Interjurisdictional Amalgamation

1. The amalgamation provisions of the Act deal only with the amalgamation of two or more Ontario corporations. Section 196(1) of the Act provides that any two or more corporations may amalgamate and by definition "corporation" is defined to mean a body corporate with share capital to which the Act applies[1]. No provision is made in the Act for the amalgamation of an Ontario corporation with a corporation incorporated either under the Canada Corporations Act or the legislation of one of the other provinces.

2. Section 198 of the Act provides, in effect, that a body corporate incorporated under the laws of any jurisdiction other than Ontario may, if it appears to the Minister to be thereunto authorized by the laws of the jurisdiction in which it was incorporated, apply to the Minister for a certificate continuing it as if it had been incorporated under the Act. The Minister may issue the certificate of continuation on application supported by such material as appears satisfactory and the certificate may be issued on such terms and subject to such limitations and conditions and contain such provisions as appear to the Minister to be fit and proper.

3. Conversely, section 199 of the Act provides for the emigration of an Ontario corporation. Under that section a corporation may, if authorized by special resolution, by the Minister and by the laws of any other jurisdiction, apply to the proper officer of that other jurisdiction for an instrument of continuation continuing the corporation as if it had been incorporated under the laws of that other jurisdiction. Section 199 applies only in respect of a jurisdiction that has legislation in force that permits bodies corporate incorporated under its laws to apply for an instrument of continuation under the laws of Ontario.

4. It might be possible, by use of the provisions of sections 198 or 199, to facilitate an amalgamation between an Ontario corporation and a corporation incorporated under the laws of another province. Either the Ontario corporation would first have to emigrate or conversely the other corporation must first apply for a certificate continuing it under the Act. The difficulty however appears to be that the procedure is cumbersome and, in any event, appears to rest on the existence of reciprocal legislation. In fact section 199 is so stated. At present, the Committee understands that only Ontario, Manitoba and Alberta have such reciprocal legislation. Bill C-213, an Act respecting Canadian business corporations, which received first reading on July 18, 1973, would appear to contain the required re-

ciprocal provisions[2]. Even if corporations were prepared to emigrate or immigrate to facilitate an amalgamation it would seem that amalgamation would only be possible in this manner between corporations incorporated in Ontario, Manitoba and Alberta.

5. The Committee is not aware of the number of corporations that have taken advantage of the "emigration-immigration" provisions to facilitate an amalgamation and understands these provisions are rarely used. A business combination between two corporations from different jurisdictions usually takes place by purchase and sale of assets or, more commonly, by the purchase by one corporation of shares of the other. The great advantage of amalgamation, particularly under provisions substantially along the lines of those contained in sections 196 and 197 of the Act, is that neither corporation to an amalgamation need convey assets or enter into novation agreements with respect to liabilities under contracts with others.

6. The Committee is accordingly of the view that the Act should contain provisions which would permit the amalgamation of Ontario corporations with corporations incorporated under the laws of Canada or of the other provinces. Provisions permitting interjurisdictional amalgamations would, of necessity, have to be founded on reciprocal legislation, federally and in the other provinces. The procedure should be the same as that now provided with the exception that the amalgamation agreement would have to state the jurisdiction under which the amalgamated company would continue.

7. While the Committee favours the creation of such a system, it is also aware that there may be difficulties to be overcome. As the Committee has already noted, interjurisdictional amalgamations will depend upon reciprocal legislation. There is also the problem of the loss of sovereignty over a corporation. However, Ontario has already succeeded in establishing a system whereby an Ontario corporation can emigrate, thus causing Ontario to lose sovereignty over such a corporation. The so-called "emigration rules" of section 199 appear to have been successfully established without jeopardizing concepts of sovereignty in the context of corporation law. It would seem equally possible to establish viable rules of interjurisdictional amalgamation.

8. Another difficulty considered by the Committee was the danger that a system for interjurisdictional amalgamation might enable an Ontario corporation to amalgamate with an extrajurisdictional corporation with the result that the rights of Ontario shareholders would become subject to a looser, more permissive body of corporation law with fewer protections for shareholders than they enjoyed when they had become shareholders of an Ontario governed corporation. However, this same problem has

already been considered in the preparation of the emigration rules of section 199 and the solution that was adopted in that context was to make the right to "emigrate" conditional upon the approval of the Minister. Thus the Minister would have an opportunity to satisfy himself, if the amalgamated corporation were to be continued under the laws of another jurisdiction, that those laws afforded substantially similar rights and protections to those enjoyed by the shareholders of the Ontario corporation. While the Committee hesitates to introduce ministerial discretion, which the Act has sought carefully to eliminate, it considers that under the circumstances an interjurisdictional amalgamation should be conditional upon the approval of the Minister.

1. The Act, section 1(1)9.
2. Bill C-213, an Act respecting Canadian business corporations, sections 177, 178.

CHAPTER 8

Sale of Assets and Amalgamations

Court Approval

1. The Committee has reviewed the advisability of imposing a requirement of court approval as a condition of the sale by a corporation of its property as an entirety or substantially as an entirety and in respect of an amalgamation. Consideration was given to the contention that such an addition would grant an added protection to the rights of the dissentient shareholder. On the other hand concern was expressed as to the expense and delay that would result from the imposition of such a requirement, and as to the resulting additional limitations that would be imposed upon a corporation's management.

2. The Committee had the benefit of the experience of the Registrar of the English Companies Court on the subject of the normal judicial approach under the compromise and arrangement sections of the English Act, which under section 208 of that Act can involve an amalgamation of two or more companies. It was apparent from his long experience that the practice of the judiciary was to ascertain that all statutory formalities in connection with the required meetings were observed, that proper notice had been given and that shareholders had been furnished with adequate information. Having been satisfied as to due compliance, the judiciary had traditionally been loathe to review the appropriateness of the price or terms of the pending sale, feeling that it was generally undesirable for the courts to sit as a sort of board of review of the decisions of management and of the appropriate majority. The Committee's observations were that the traditional approach of the Ontario courts to such problem has been the same.

3. The present law of Ontario entitles a dissentient shareholder to apply in the ordinary way to the courts for redress if he should establish that the management or directors or the majority of shareholders are acting in a way that is fraudulent or oppressive to him. This general right to seek redress from the courts in such circumstances will still be available to dissenters, even though no express requirement of court approval is added to the Act in respect of sales of assets or amalgamations.

4. The Committee had concluded, on balance, that no useful purpose would be served by requiring the approval of the court to the sale by a corporation of its property as an entirety or substantially as an entirety or to an amalgamation.

CHAPTER 9

Sale of Assets and Amalgamations

Disclosure Requirements

1. In each of the forms of business combination — sale and purchase of assets, amalgamation and take-over bid — there is a common factor, the need for the shareholder to be sufficiently well informed to make an intelligent judgment on voting or as to the advisability of accepting the take-over bid.

2. The Securities Act provides for the disclosure required in relation to a take-over bid and these requirements are referred to in chapter 10. The Committee has concluded that, subject to the recommendation made in chapter 13, the disclosure required in connection with a take-over bid is adequate, particularly since a prospectus-type disclosure must be made if the take-over bid involves securities of the offeror.

3. The sale by a corporation of its property as an entirety or substantially as an entirety must be authorized by special resolution and an amalgamation agreement must be approved by special resolution. In each case shareholder action is necessary. In the case of a corporation that is offering its securities to the public[1], the management of such corporation is required to send to each shareholder a form of proxy[2]. Since by virtue of section 115(d) (iv) of the Act the sending of such proxy is a solicitation, management is obliged to send to the shareholders an information circular[3], containing the information prescribed in Form 15 of the Regulations made under the Act.

4. Management of a corporation that is not offering its securities to the public is not required to send a form of proxy to shareholders in connection with a meeting[4] and accordingly there is no obligation on the management of such a corporation to furnish an information circular.

5. Item 10 of Form 15 provides for the type of disclosure that must be made in an information circular with respect to a sale of property or an amalgamation as follows:

> "If action is to be taken on any matter to be submitted to the meeting of shareholders other than the approval of financial statements, the substance of each such matter, or related group of matters, should be briefly described, ... in sufficient detail to permit shareholders to form a reasoned judgment concerning any such matter. Without limiting the generality of the foregoing, such matters include . . . property acquisitions or dispositions, amalgamations, mergers or reorganizations . . . ".

It is apparent that there could be wide differences in viewpoint, in the preparation of an information circular, as to what constitutes a *brief* descrip-

tion of the transaction in sufficient detail to permit shareholders to form a reasoned judgment which could range from an overabundance of information on one hand to information of the most meagre nature on the other.

6. The Committee is of the opinion that Form 15 should spell out in greater detail the nature of the information that should be furnished in an information circular, particularly in the case of an amalgamation. For instance, it should be mandatory to include information with respect to the business and properties of the other corporation to the amalgamation, information with respect to the share-exchange ratio and how this was arrived at by management, information as to the tax consequences to the amalgamating corporations and the shareholders, and financial statements of each of the amalgamating corporations and a pro forma financial statement giving effect to the amalgamation. Some of the information required to be included in a take-over bid circular would also appear to be relevant, in particular the type of disclosure afforded by clauses 1, 2, 7, 8 and 9 of section 91 of The Securities Act[5]. Necessary modifications would of course have to be made to fit the disclosure so required into the context of an amalgamation or sale of assets. There should also continue to be the general requirement of furnishing such other relevant information as may be necessary to enable shareholders to reach an informed conclusion.

7. The framework of the Act under which management of a corporation that is not offering its securities to the public need not send a form of proxy to shareholders in connection with a meeting and therefore has no obligation to furnish an information circular has given the Committee some concern. To impose a general requirement that management of all corporations must furnish an information circular would impose an undue burden on the many smaller corporations with few shareholders who are active in the business and, as a result, probably reasonably well informed. On the other hand, by reason of the definition which deems a corporation to be either an "offering" corporation or a "non-offering" corporation, there could be non-offering corporations with a sizeable body of shareholders who should have the benefit of an information circular in connection with a sale of assets or amalgamation. On balance, the Committee has concluded that the requirement to furnish an information circular in connection with an amalgamation or sale of assets should apply to all corporations except corporations where the articles contain a restriction on the right to transfer shares, other than a restriction which would come within the ambit of section 47(2)(a) or (b) of the Act.

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1. Section 1(9) of the Act provides in part:
   "(9) For the purposes of this Act a body corporate is offering its securities to the public only where,
   (a) in respect of any of its securities a prospectus, statement of material facts or securities exchange take-over bid circular has been filed under The Securities Act or any predecessor thereof or in respect of which a prospectus has been filed under The Corporations Information Act, 1971, or any predecessor thereof, so

long as any of such securities are outstanding or any securities into which securities are converted are outstanding; or

(b) any of its shares are listed and posted for trading on any stock exchange in Ontario recognized by the (Ontario Securities) Commission." (brackets added).

2. The Act, section 117 which provides:
"117. Subject to section 119, the management of a corporation shall, concurrently with giving notice of a meeting of shareholders of the corporation, send by prepaid mail to each shareholder who is entitled to vote at such meeting at his latest address as shown on the records of the corporation a form of proxy that complies with section 120 for use at the meeting.".

3. The Act, section 118(1)(a).

4. The Act, section 119(1) which provides:
"119(1) Section 117 and subsection (1) of section 118 apply only to a corporation that is offering its securities to the public.".

5. See Appendix B.

CHAPTER 10

Take-Over Bids

General

1. Although the legislation in Ontario relating to take-over bids is found in The Securities Act and not in The Business Corporations Act, the Committee was of the opinion that it should examine this legislation and other matters surrounding take-over bids because the take-over bid is an important vehicle for effecting a business combination. No study of the topic "mergers and amalgamations" would be complete without at least a general review of the legislation governing take-over bids.

2. A take-over bid is defined in The Securities Act[1] as follows:

> "take-over bid" means an offer, other than an exempt offer, made to shareholders the last address of any of whom as shown on the books of the offeree company is in Ontario to purchase such number of equity shares of a company that, together with the offeror's presently owned shares, will in the aggregate exceed 20 per cent of the outstanding equity shares of the company;".

A company whose shares are the subject of a take-over bid is defined as an "offeree company".[2]

3. Exempt offer is defined as meaning:[3]

"(i) an offer to purchase shares by way of private agreement with fewer than fifteen shareholders and not made to shareholders generally,

(ii) an offer to purchase shares to be effected through the facilities of a stock exchange or in the over-the-counter market, where such purchases are reported in accordance with section 110a (of The Securities Act),

(iii) an offer to purchase shares in a private company, or

(iv) an offer exempted by order of the Commission made under section 90 (of the Securities Act).".

4. Section 82 of The Securities Act sets out provisions which are applicable to every take-over bid whether the bid is an all cash bid or involves securities of the offeror. The provisions of Section 82, which are set out as Appendix A, establish the ground rules applicable to all take-over bids.

5. A take-over bid must be accompanied by a take-over bid circular containing the information required by section 91 of The Securities Act, which is set out as Appendix B. In addition, where a take-over bid provides that the consideration for the shares of the offeree company is to be, in whole or in part, securities of a company, the take-over bid circular must contain the information prescribed by the appropriate form of prospectus prescribed by the Regulations that provides the most significant information

concerning the affairs of the company whose securities are being offered in exchange for the shares of the offeree company, together with certain financial statements.[4] The disclosure required in such cases is a prospectus type disclosure but the take-over bid circular is not submitted to the Ontario Securities Commission in advance of use for its review and comments. The Regulations under The Securities Act provide that a copy of the take-over bid circular must be filed with the Commission on the same date that it is sent to the shareholders of the offeree company.[5]

6. The board of directors of the offeree company is not required to send any information or to make any recommendation about the take-over bid to the shareholders of the offeree company. If, however, the board of the offeree company recommends to the shareholders either acceptance or rejection of the bid, the directors are required to send to the shareholders of the offeree company a directors' circular containing the information prescribed by section 96 of The Securities Act,[6] which is set out as Appendix C.

7. The large number of take-over bids which have occurred in England in the last several years, of which a surprising number were contested, led the Committee to a consideration of the legislation and other regulations existing in England which govern take-over bids. A combination of legislation and self-regulatory supervision has been developed. The Licensed Dealers (Conduct of Business) Rules 1960 promulgated pursuant to The Prevention of Frauds (Investments) Act 1958 contain certain provisions with respect to take-over bids. These Rules, however, apply only to licensed dealers and, while very few licensed dealers are involved in take-over bids, the Committee's information is that the Rules are generally complied with in respect of most take-over bids. The code of conduct governing take-over bids in England is found in the principles and rules of The City Code on Take-overs and Mergers (the City Code)[7]. The City Code is not found in legislation and does not have the force of law. It is issued on the authority of the City Working Party,[8] a body originally set up by the Governor of the Bank of England in 1959 for the purpose of considering good business practice in the conduct of take-overs and mergers. The introduction to the third edition of the City Code (revised February 1972) states the framework of the Code in the following manner:

> "The provisions of the City Code fall into two categories. On the one hand, it enunciates general principles of conduct to be observed in take-over and merger transactions; these general principles are a codification of good standards of commercial behaviour and should have an obvious and universal application. On the other hand, the City Code lays down a series of rules, some of which are no more than examples of the application of the general principles and others are rules of procedure designed to govern specific forms of take-over and merger transactions practised in the United Kingdom.

The City Working Party points out that some of these general principles, based as they are upon a concept of equity between one shareholder and another, while readily understandable in the City and by those concerned with the securities markets generally would not easily lend themselves to legislation. The City Code is therefore framed in non-technical language and is, as a measure of self-discipline, administered and enforced by the Panel on Take-overs and Mergers, a body representative of the City itself. The duty of the Panel is the enforcement of good business standards, not the enforcement of law.".

8. There is division of opinion in England about the desirability of enshrining the provisions of the City Code in legislation. Those who support the "non-legal" approach point to the flexibility of the Code, the ability to introduce principles or rules or amendments quickly to meet particular situations or abuses as they arise and the availability of the staff of the Panel for ready consultation and assistance in take-over bid situations. Those who favour a legislative approach point to the lack of effective remedies which are at best "old school" in their nature, i.e., reprimand, public censure or deprivation of the ability of a person to enjoy the facilities of the securities markets. Ontario has embarked on a legislative course rather than an industry oriented self-regulatory scheme. The Committee considers it possible through the legislative course on which Ontario has embarked to provide for a concept of equity between one shareholder and another and to lay down good standards of commercial behaviour and general principles of conduct to be observed in take-overs. The Committee can see no reason why this should not be continued.

9. Notwithstanding its non-legal nature, the City Code appears at this time to be working well and a number of provisions, incorporated as a result of the wealth of experience in England, commend themselves to the Committee and are discussed in more detail in later chapters.

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1. The Securities Act, section 81(g).
2. The Securities Act, section 81(d).
3. The Securities Act, section 81(b).
4. The Securities Act, section 86(3), s.95. The Regulations under The Securities Act prescribe, in Forms 13, 14, 15, 16, 18, 19, the information required in the prospectus of various types of companies, i.e. an industrial company, a finance company, an investment company, etc.
5. The Securities Act, Regulation 64.
6. The Securities Act, s.87.
7. Third Edition, revised February 1972.
8. The City Working Party consists of representatives of:
   The Accepting Houses Committee
   The Association of Investment Trust Companies
   The Association of Unit Trust Managers
   The British Insurance Association
   The Committee of London Clearing Bankers
   The Confederation of British Industry
   The Issuing Houses Association
   The National Association of Pension Funds
   The Stock Exchange, London.

CHAPTER 11

Take-Over Bids

The Private Agreement

1. The acquisition of effective control of a company by way of private agreement to purchase such control from a small group of controlling shareholders is a common occurrence. If the number of vendors is less than fifteen, the transaction is an exempt offer[1] and the take-over bid provisions of The Securities Act do not apply. If securities of the acquiring company are involved, the transaction is also exempt from the registration[2] and prospectus[3] provisions of The Securities Act. The acquisition of effective control by private agreement almost invariably involves the payment of a premium to the selling shareholders and in many cases no general offer is made to the other shareholders to acquire their shares on the same or substantially similar terms. The other shareholders are in the position where control of the corporation in which they have invested has changed leaving them with two options—to remain as shareholders and accept the changed situation or to sell their shares on the market at a price which will undoubtedly be less than the price received by the controlling shareholders. Should this situation be allowed to continue, should the legislation remove the present private agreement exemption or should the legislation continue the exemption but require, as a condition, that a general offer be made by the offeror to all other shareholders of the same class?

2. This matter was considered earlier by the Committee of The Ontario Securities Commission on the problems of disclosure raised for investors by business combinations and private placements (the so-called "Merger Study"). In its report (the so-called "Merger Study Report") issued in February 1970, that Committee stated it was loath to recommend prohibiting all exempt offers, thus requiring all acquisitions to be made through circulars and all offers to be made pro rata to all shareholders.[4] In submissions made to the Committee, representatives of The Ontario Securities Commission indicated their thinking on this matter had changed since the publication of the Merger Study Report and that they now favoured the requirement of a general offer to the remaining shareholders.

3. If the requirement of a general offer to remaining shareholders is imposed, the controlling shareholder or the controlling group will undoubtedly be deprived of a substantial part of the premium which they might otherwise obtain by way of a private sale of effective or actual control. On the other hand, without such a requirement, the position of the minority may be prejudiced and examples were given to the Committee where this has happened. The Committee is thus faced with the difficult task of protecting interests.

4. So far as the Committee is aware, there appears to be no restriction under Ontario law (other than perhaps the general fiduciary obligation of directors to act bona fide in the best interests of the company) imposed on the sale of shares by way of private agreement and obtaining a premium on the sale of such shares if they represent "control". There seems to have been a gradual development in England preventing the sale of control unless a general offer is extended to all shareholders and by various amendments to the City Code, which are discussed in Section 5, the development seems to be virtually complete. Bearing in mind the introduction to the City Code[5], it must be assumed that in England, at least, the requirement for a general offer is regarded as good standard commercial behaviour based upon a concept of equity between one shareholder and another. There appears to be no legislation in the United States on the subject but, in certain cases, the courts there have given relief to minority shareholders[6].

5. The approach now taken by the City Code is, for all practical purposes, to prohibit a transfer of effective control unless a general offer is made not only to the holders of the same class of shares but also to the holders of any other class of equity share capital. Originally, under Rule 10, the prohibition extended only to directors, their families and trusts. This Rule provides:

> "10. Directors whose shareholdings, together with those of their families and trusts, effectively control a company, who contemplate transferring effective control, should not, other than in special circumstances, do so unless the buyer undertakes to extend unconditionally within a reasonable period of time the same offer to the holders of the remaining capital of the same class and a comparable offer to the holders of any other class of equity share capital whether such capital carries voting rights or not. In such special circumstances the Panel must be consulted in advance and its consent obtained. For the purposes of this Rule the term "Directors" includes persons in accordance with whose instructions the Directors are accustomed to act.".

Subsequently, the addition of Rule 34 extended the prohibition to cover any purchaser of effective control:

> "34. Except in a case specifically approved by the Panel, the purchaser from a limited number of sellers of a significant holding or holdings which confer effective control must extend an offer to the remaining shareholders on the basis set out in Rule 10.
>
> Where the transfer of effective control has already taken place, the subsequent general offer should not be made conditional on any particular level of acceptances.".

The City Code now also seeks to inspire the same requirement in the case of the acquisition of control by means of a "creeping" take-over. Rule 35 provides:

> "35. Any person who acquires, whether by a series of transactions over a period of time or not, shares which (together with shares acquired by other persons acting in concert with such person) carry 40% of the voting rights (other than rights exercisable only in restricted circumstances) attributable to the share capital of a company must, except in a case specifically approved by the Panel, extend within a reasonable period of time an unconditional offer to the holders of the remaining equity shares of the offeree company. The Panel should be consulted in cases where more than one class of equity share capital carrying voting rights is involved. The offer required to be made under the provisions of this Rule shall, in respect of each class of equity share capital, be in cash or shall be accompanied by a cash alternative at not less than the highest price (excluding stamp duty and commission) paid by such person for shares of that class within the preceding 12 months. The Panel should be consulted as to the offer to be made for any class of equity share capital in respect of which no acquisitions have taken place within such period.".

One might well wonder how Rule 35 could be enforced in many situations.

6. A serious division of opinion exists within the Committee on this important matter. Cogent arguments were advanced by those members of the Committee who favour maintaining the present exemption and by those who urge some change.

7. The majority of the Committee (Mrs. Scrivener and Messrs. Belanger, Johnston, Meen, Reilly and Smith) favours maintaining the present exemption. They point out that shares of a corporation are a form of personal property and that the owner should be entitled to dispose of them by private agreement on whatever terms he may consider advisable without interference on the part of the legislature, that the topic being considered is not the behaviour of the controlling shareholder in relation to the corporation's affairs, but his freedom to dispose of his shares privately as he thinks fit and that this freedom should not be diminished unless there are cogent and overriding reasons for so doing. The majority is further of the view that to abolish the private agreement or to impose the obligation of a general offer to shareholders would reduce the incentive for a person to develop and manage a business by denying such person a well merited premium for his efforts.

The majority of the Committee also feels that the imposition of a requirement to make a general offer could impose economic hardship on the prospective purchaser; while such a purchaser might be able to command the financial resources to purchase the controlling shares, he may not be able to muster the financial resources to purchase the remainder of the shares; and accordingly such requirement would lead to the situation where control could only be acquired by those who could afford

to buy all the shares of a corporation. The majority also rejects the adoption of the principles expressed in the City Code on the basis such principles do not represent a legal enactment but are of persuasive force only and that in any event such principles have been developed for application to a financial system whose resources, philosophy and operations are different from our own.

8. The minority of the Committee (Messrs. Good, Lawlor, Renwick and Singer) is of the view that, while the sale of control or effective control by private agreement should not be abolished, the present exemption in The Securities Act should be made conditional on the person acquiring such control making within a reasonable period (which the minority feels should be not later than 60 days after acquisition of control) an offer to the remaining shareholders of the same class which offer should not be conditional on any level of acceptance. Such a requirement should also cover a change of control or effective control by private agreement in the case of a private company. The views of the minority with respect to the kind of offer which should be extended to the remaining shareholders are set out in later sections of this chapter.

9. While the elimination or reduction of the premium on the sale of control may be viewed as a move towards removing an incentive for entrepreneurship, the minority of the Committee feels that on analysis the argument in favour of permitting such a premium may not be as strong as it appears. Conceptually, at least, each share in the capital of a company is the same as every other share of the same class and entitles the holder to an aliquot interest in the company. When a controlling shareholder sells control, the thing he is really selling is corporate assets and the right to control the use of those assets and those assets belong to all of the shareholders, not merely the controller. There are in the opinion of the minority of the Committee valid arguments to be made on a conceptual basis that any premium on the sale of control should be shared by all shareholders. The minority of the Committee rejects the argument that the requirement for a general offer would lead to economic hardship as a justification for maintaining the present exemption. The minority is not entirely persuaded that economic hardship would be an inevitable result. The minority adopts the principles of the City Code on this important matter and agrees with the language of the introduction to the City Code that the requirement for a general offer must be regarded as "good standard commercial behaviour based upon a concept of equity between one shareholder and another". The argument that the City Code is not a legal enactment is, in the view of the minority, not convincing since the provisions of the City Code are invariably followed in almost every instance.

10. The minority of the Committee is of the opinion that the offer to be extended to the other shareholders should involve a consideration identical

to that paid to the sellers of control. The minority can see no objection, however, if the offer to the remaining shareholders also contains an alternative consideration. For instance, the consideration paid to the sellers of control may have been cash; the offer to the remaining shareholders could then be for cash or alternatively for securities of the acquiring company. The remaining shareholders would then be free to exercise a judgment whether or not to accept the offer and to determine which consideration it would accept. Should the requirement to make an offer extend to all shareholders, as seems to be the case in England, or only to shareholders of the same class as those involved in the private agreement? In almost all cases of the sale of control or effective control by private agreement, only the common shares of a company are involved. If such a company has preference shares outstanding, the nature of the investment of the holder of a preference share is probably different from the investment of the remaining holders of the common shares since it is governed by the attributes and characteristics attaching to the preference shares. The holder of preference shares has opted for a preference share position and his terms are specific and definite. Such a holder has a different relationship to the company from that of the holder of a common share. This situation is different if the preference shares are convertible into common shares. In such a case, the holder of a preference share is or may be directly affected by the private agreement. The same may also be said about debt securities convertible into common shares and warrants or options to purchase common shares. The minority of the Committee has concluded that the requirement to extend a general offer should only be extended to the holders of the class of shares involved in the private agreement.

11. If there are outstanding shares or debt securities convertible into or warrants or options outstanding for the purchase of the class of shares involved in the private agreement, then, in the view of the minority, the person acquiring control by way of private agreement should be required to notify the holders of such shares, debt securities, warrants or options that it has made an offer to the remaining shareholders of the class of shares involved and of the general terms of such offer. Such notice should be given not later than the date on which the offer is made to the remaining shareholders. Such a notice would then permit the holders of the convertible shares or debt securities or such warrants or options to exercise a discretion as to whether they should effect conversion or exercise the warrants or options in order to take advantage of the offer. Since debt securities and warrants are in many cases held in bearer form, such notice may in these cases have to be given by publication and to accommodate this situation an appropriate amendment to section 83 of The Securities Act may be necessary.

12. The problem of what percentage of shares would constitute the acquisition of control is troublesome. It is clear that in many instances an effec-

tive control can be obtained by the acquisition of less than a majority of voting shares. The minority of the Committee is of the view that it is the acquisition of effective control as opposed to majority vote control which should be the governing factor. The percentage of voting shares which may be necessary to establish effective control will of course vary in any particular case. The Securities Act has proceeded on the basis that 20% of the outstanding voting shares would in most cases constitute an effective control[7]. While the minority hesitates to indulge in the "numbers game", they feel that the acquisition of 20% of the voting shares of a company by way of private agreement should be presumed to be the acquisition of control for the purpose of determining if a general offer to the remaining shareholders should be made. There may be cases where the ownership of less than 20% of the voting shares could constitute an effective control, but the minority is of the view that certainty in the legislation is more important than an attempt to sweep in all situations of effective control by use of some definition for this purpose which might only lead to uncertainty and confusion. In those cases where an acquisition of 20% of voting shares would not constitute an acquisition of effective control, application could be made to the Commission for exemption from the requirement to make a general offer as recommended by the minority.

13. The minority is not unmindful that, in the case of a private agreement, there may, in certain circumstances, be a compelling reason why a general offer need not be made. Some flexibility should be provided, as is the case with the City Code, and the Ontario Securities Commission should have the right to order, under proper circumstances, that a general offer need not be made.

14. The minority has also considered its position in the light of the current climate with respect to foreign investment. If a foreigner or foreign controlled company seeks to acquire control of a Canadian company, the recommendations of the minority would appear to enable that person or company to acquire a substantially higher percentage of ownership than would be the case if the recommendations of the minority were otherwise. The minority of the Committee recognizes that its recommendations on this matter must be subject to government policy with respect to foreign ownership and that legislation or regulations may be passed or made, having regard to other considerations, which might prevent the recommendations of the minority from being effective. Nevertheless, the minority of the Committee is of the opinion that, notwithstanding such other considerations, its recommendations are right and proper from a corporate point of view.

1. The Securities Act, section 81(b)(i).
2. The Securities Act, section 19(1)9a.
3. The Securities Act, section 58(1)(c).
4. Merger Study Report, section 7.04.
5. Supra, chapter 10, section 7.
6. Pearlman v. Feldman 219F2d 173; Brown v. Halbert, 76 Cal. Rptr. 781.
7. The Securities Act, section 1(1)6a.

CHAPTER 12

Take-Over Bids

Partial Bids

1. A partial bid may be considered to be either one of the following:
   (a) a bid made for only a part of the shares of a class, usually the minimum number of shares to give the bidder legal control, leaving the remaining shares of that class in the hands of a minority, or
   (b) in cases where a company has more than one class of shares, a bid either for all or part of the shares of one class but not extended to the holders of the shares of any other class.

Although a bid may be said to be partial in either of these situations, the term "partial bid" is usually associated with the type of bid referred to in clause (a) above. The Securities Act contains special provisions relating to such a partial bid.[1]

2. The particular provisions of The Securities Act dealing with this type of partial bid may be summarized as follows:
   (a) shares deposited pursuant to the bid shall not be taken up and paid for until the expiration of 21 days from its date,
   (b) the period of time within which shares may be deposited pursuant to the bid, or any extension thereof, shall not exceed 35 days from the date of the bid,
   (c) shares deposited pursuant to the bid shall be taken up and paid for within 14 days after the last day within which shares may be deposited pursuant thereto,
   (d) where a greater number of shares is deposited pursuant to the bid than the offeror is bound or willing to take up and pay for, the shares taken up by the offeror shall be taken up as nearly as may be pro rata,
   (e) The offeror shall not reduce the number of shares he is bound or willing to take up under the bid by the number of shares he may have purchased in the market.

3. The provisions of Section 82, as they relate to partial bids, are designed to give all shareholders an equal opportunity of disposing of their shareholdings, at least in part, pursuant to the bid. The Committee feels that these provisions are generally satisfactory and no submissions were made to the Committee indicating a need for revision. The Committee is, however, of the opinion that some revisions of Section 82.9 of The Securities Act may be warranted. This Section contemplates the possibility that the offeror, during the course of a take-over bid, may purchase securities in the market and where the bid is made for less than all the equity shares owned by the offeree, the offeror shall not reduce the number of shares he is bound or willing to take up by the number of shares purchased in the market. A

bid may be for all of the securities of a class, but conditional upon a specified minimum level of acceptance; a bid may be a partial bid for a specified percentage of the securities of a class. In both these cases, it would appear to the Committee that any securities purchased by the offeror during the course of a take-over bid should be considered as having been acquired pursuant to the bid for the purpose of determining if the stated level of acceptance or specified percentage has been reached. The Committee therefore recommends that Section 82.9 of The Securities Act be amended accordingly.

4. The Committee has also considered the question of partial bids from the more basic point of view of whether or not they should be permitted. The City Code does not prevent the making of a partial bid but proceeds on the basis that, generally speaking, bids for less than 100% of the equity share capital of an offeree company are undesirable and are only permitted with the approval of the Panel obtained in advance.[2] The City Code does not appear to contain a definition of "equity share capital"; in the absence of such a definition, it is assumed it means all classes of shares in the capital of the Company whether or not voting. Thus it would appear that the City Code is directed against the type of partial bid referred to in Section A.3.1(b). There appears to be no prohibition in the United States against the making of a partial bid.

5. A partial bid may be considered in some respects as similar to the transfer of effective control by way of private agreement. With the private agreement, there is an existing control which is being transferred; with the partial bid a person or company usually seeks to gain effective control by a bid for less than all the shares of a company. But the partial bid is made to all shareholders and all shareholders can exercise judgment to accept or reject the bid as they see fit. The payment of a premium for control to a shareholder or small group of shareholders is absent; all shareholders are offered the same price.

6. The Committee has concluded that, on balance, it does not favour at this time the abolition of partial bids for less than all the equity shares (as defined in The Securities Act)[3] of a company.

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1. The Securities Act, section 82.4., 5., 6., 7.
2. The City Code, rule 27:
   "27. Generally speaking, offers for less than 100% of the equity share capital of an offeree company not already owned by the offeror or any of its subsidiaries are undesirable. If there are circumstances in which a general offer for less than 100% is, in the opinion of the offeror, justified, the Panel's approval must be obtained in advance. Such an offer must be made to all shareholders of the class and arrangements must be made for those shareholders who wish to do so to accept in full for the relevant percentage of their holdings. Other than in special circumstances a partial offer not conferring voting control may not be made: but where such an offer is made the precise number of shares offered for should be stated and the offer may not be declared unconditional unless acceptances are received for not less than that number.".
3. The Securities Act, s. 1(1)7:
   "7. "equity share" means any share of any class of shares of a company carrying voting rights under all circumstances and any share of any class of shares carrying voting rights by reason of the occurrence of any contingency that has occurred and is continuing;".

CHAPTER 13

Take-Over Bids

The Directors of the Offeree Company

1. The directors of the offeree company are not required under The Securities Act to take any action with respect to a take-over bid or to furnish any information to the shareholders of the offeree company. Where the directors of the offeree company recommend either acceptance or rejection of the bid, they are then required to send to the shareholders of the offeree company a directors' circular containing the information prescribed in section 96 of The Securities Act (see Appendix C).

2. The Committee can think of no valid reason why the issue of a directors' circular should depend on whether the directors propose to recommend acceptance or rejection of the bid. The shareholders of the offeree company should be entitled to as much information as possible to enable them to form a reasoned judgment regarding acceptance or rejection of the bid. The directors' circular provides information which should be made available to the shareholders under all circumstances. This is particularly so with respect to the statements required by the directors' circular as to whether or not each director and senior officer of the offeree company has accepted or intends to accept the offer on his own behalf and the requirement for disclosure of any information which might indicate any material change in the financial position or prospects of the offeree company since the date of its last published financial statements. The Committee therefore recommends that a directors' circular be made mandatory in the case of all take-over bids.

3. The Committee also considered whether or not the directors of the offeree company should in all cases be required to make a recommendation to the shareholders either to accept or reject the bid. The directors of the offeree company should be free to make such a recommendation if they see fit, but it should not be obligatory. Such a requirement would, in effect, place the directors of the offeree company in the role of investment advisers and this the Committee considers undesirable. The requirement of a mandatory directors' circular should be sufficient.

4. The Committee is concerned that the disclosure required by Section 96.2 of The Securities Act is not adequate. This subsection requires that a directors' circular contain a statement "as to whether each director and senior officer of the offeree company . . . . have accepted or intends to accept the offer in respect of *any* shares of the offeree company sought to be acquired". The disclosure required is not whether a director or senior officer intends to accept with respect to all or a specified percentage of

his shares but only if he intends to accept with respect to any shares, without specifying the amount. Such disclosure, in certain circumstances, could give information which might be misconstrued by a shareholder. The Committee recommends that Section 96.2 be amended to require directors and senior officers to disclose in the directors' circular the number of shares which they hold in the offeree company in respect of which they intend to accept the take-over bid.

CHAPTER 14

Take-Over Bids

Defences to a Take-Over Bid

1. In many cases the interest of the board of directors or the controllers of a target company and those of the shareholders may not always be the same in the case of a take-over bid. The controllers enjoy certain benefits from their control which they may not be anxious to lose. As a result, the board of directors of a company may in certain circumstances take action by way of defensive measures against a take-over bid. Certain of these actions may be defensive measures to discourage the making of a bid where it is felt a bid may be in contemplation or, alternatively, to arrange the affairs of the company in such a way that a successful bid would be impossible. Defensive measures might also be undertaken by the board after a bid has been made in an effort to prevent the bid from being successful.

2. The Committee is concerned primarily with defensive measures which may be taken after a bid has been made or in anticipation of a bid where there are good grounds to believe a bid will be made. There is possibly equal concern for defensive measures which may have been taken in advance to protect a company against the possibility of a take-over before the specific threat of a bid but, in these cases, it may be very difficult to establish whether the action taken was to protect against a take-over bid or was for some other valid reason. What concerns the Committee with respect to defensive action taken after a bid is announced or made is that the shareholders may be prevented from exercising judgment as to the value and merits of the bid and whether or not to accept it. The bid then becomes thwarted by action of the directors. The action which may be taken by the directors in these circumstances may, for instance, involve the sale of certain attractive assets of the target company to friendly hands, the declaration of an unusual dividend or a so-called defensive "merger". Examples were cited to the Committee where such actions had the effect of frustrating a bid.

3. The possibility that defensive action may be taken in the face of a take-over bid is recognized in section 82.10 of The Securities Act. This section provides as follows:

> "10. The offeror shall not attach any conditions to the offer except the right to withdraw the offer if the offerees fail to tender the minimum number of shares the offeror is bound and willing to take up or where the action of the board of directors of the offeree company subsequent to the date of the offer materially changes the undertakings, assets or capital of the offeree company.".

This provision permits the offeror to void the take-over bid in the event of certain defensive actions, but is this sufficient?

4. It was found necessary in England, presumably as a result of a number of instances of defensive action, to make provision in the City Code to prevent action being taken by a board of directors which would frustrate a bid. Rule 38 of the City Code provides as follows:

> "38. During the course of an offer, or even before the date of the offer if the Board of the offeree company has reason to believe that a *bona fide* offer is imminent, the Board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general meeting, issue any authorised but unissued shares, or issue or grant options in respect of any unissued shares, create or issue or permit the creation or issue of any securities carrying rights of conversion into or subscription for shares of the company, or sell, dispose of or acquire or agree to sell, dispose of or acquire assets of material amount or enter into contracts otherwise than in the ordinary course of business. Where it is felt that an obligation or other special circumstance exists, although a formal contract has not been entered into, the Panel must be consulted and its consent obtained.".

5. The directors of a target company should be entitled to defend against a take-over bid by all persuasive means at their disposal. If the directors can persuade the shareholders the bid is not attractive or that the shareholders will be better off continuing with present management, they should not be precluded from doing so. In such cases, the shareholders have not been deprived of the opportunity of assessing the bid and reaching their own conclusions. What is of concern is the unilateral action that may be taken by a board which deprives the shareholder of an opportunity of assessing the bid.

6. The Committee has concluded that the appropriate legislation should contain provisions substantially similar to those of Rule 38 of the City Code which would prevent the board of directors, after an offer had been made or before an offer was made if the board had reason to believe that one would be made, from taking the kind of actions referred to in Rule 38 without the prior approval of the shareholders. The Committee has considered whether or not any greater vote than a majority should be required to authorize the taking of any such action but feels that under the circumstances a simple majority is sufficient. In view of the time which it might take to convene a meeting of shareholders, consideration might have to be given to extending the period of time referred to in section 82.1 of The Securities Act during which an offer must remain outstanding. If any such action is taken with the approval of the shareholders of the offeree company, the offeree should, of course, be entitled to terminate its bid.

CHAPTER 15

Take-Over Bids

Conditions in a Take-Over Bid

1. Section 82.10 of The Securities Act provides in effect that the offeror shall not attach any conditions to the offer except in the narrow area provided in that section. This section was added to The Securities Act in 1971 as a result of the Merger Study Report. Section 7.25 of the Merger Study Report noted that on occasion an offeror includes in its tender offer what are known as "market out" clauses but did not go on to state the kind of clauses which the Merger Study categorized as market out clauses. The Merger Study then recommended that such escape clauses be prohibited in take-over bids. Presumably, the Merger Study considered that any conditions which might be attached to a take-over bid were in effect market out clauses since the summary of recommendations in section 7.36 of the Merger Study Report provided:

> "(10) An addition should be made to section 81 (now section 82) prohibiting any conditions added by the offeror to the offer excepting the right to withdraw on the failure of the offerees to tender the minimum number of shares of particular classes he was willing to accept.".

2. Prior to the enactment of section 82.10, it was normal for an offeror to include certain conditions in its offer. Although such conditions probably varied from one take-over bid to another, in most cases an offer was stated to be conditional upon the deposit of a minimum number of shares, the delivery of appropriate legal opinions, no changes having taken place in the authorized or issued capital of the offeree company during the period of the bid (other than by way of conversion of already outstanding shares or as a result of the exercise of outstanding options or warrants), the accuracy of the latest financial statements of the offeree company, no material adverse change in the financial position of the offeree company since the latest financial statements and no material change in its assets. In those cases where approval of some regulatory authority was required to the acquisition, the issuance of the required approval or permission was also made a condition.

3. The reasons given in section 7.25 of the Merger Study Report why no conditions should be attached to a take-over bid were that the offeree is committed to sell his shares once they are tendered and the period of withdrawal has run and the offeror ought to be similarly committed subject to his share objective being achieved. It was also stated to the Committee in support of the present position that the offeror should be considered in the same position as any other person who makes a purchase of stock on a

stock exchange where no conditions are imposed. It seems to the Committee, however, that a company that makes a take-over bid should not be so regarded. The offeror is making more than an investment. The purpose of the take-over bid, presumably, is to enable the offeror to acquire control of the assets and business of the offeree company as a going concern. It is, as well, interested in the earnings and financial position of the offeree company. If, for instance, a substantial plant of the offeree company were extensively damaged or destroyed or a valuable contract held by the offeree company was terminated between the making of the offer and prior to the take up of shares deposited thereunder, the offeror under the existing legislation would nevertheless be bound to complete the purchase even though the condition of the offeree company has substantially changed from that on which the offer was based. A substantial change in the financial position of the offeree company since its latest published financial statements could be equally damaging to the offeror but it would nevertheless be required to complete the bid.

4. The Committee can appreciate that permitting an offeror to include extensive conditions in the bid may give the offeror the opportunity of "reassessing" its bid after it has been made. There is the added difficulty that the determination of whether a condition has been met is usually phrased as being "in the opinion of the offeror" which introduces a subjective test. To prohibit all conditions appears to be unjust to the offeror. What must be determined is on whom should rest the risk of changes in the offeree company, beyond the control of either offeror or offeree, which may affect the value of the offeree company. The position of the offeree is that the bid is terminated and he receives back his shares if they have been deposited. His position is no worse than it would have been had the offer not been made except for the right to sell his shares on the market between the date of deposit and the time his shares are returned. The offeror on the other hand is making a substantial commitment which, as the Committee has noted, is more than an investment. It seems to the Committee the risk to the offeror is much greater than the risk to the offeree.

5. The Committee is of the view that the offeror should be entitled to include in its take-over bid reasonable conditions which should be carefully delineated in the legislation. Without attempting to be exhaustive, examples which come to the mind of the Committee are substantial damage, destruction or loss of major assets, a substantial change in the financial affairs of the offeree company since the date of its last published financial statements, approvals or permissions from regulatory bodies, where required, and an intervening act of a governmental authority which may have the effect of frustrating a bid. The Committee is not, of course, suggesting in any sense that there should be any right of rescission after a take-over bid is closed.

CHAPTER 16

Take-over Bids

Market Purchases During a Take-over Bid

1. The Securities Act contains no prohibition which would prevent the offeror from purchasing in the market shares which are the subject of a take-over bid. In fact, The Securities Act contemplates that an offeror may be in the market during the course of a bid. Section 82.9. provides in part that "where the offeror intends to purchase securities in the market, his intention shall be set out in the take-over bid circular".

2. In the United States, an offeror is precluded, during the course of a cash tender offer or exchange offer, from purchasing shares in the market[1]. The City Code permits market purchases during the course of a bid which is not a partial offer and requires a daily disclosure to the London Stock Exchange, the Panel and the Press of the total of all shares purchased and the average price[2]. The City Code does however prohibit market purchases in the case of a partial bid during the offer period[3]. The City Code also provides, in those cases where market purchases are permitted, that, if the offeror or any person acting in concert with the offeror purchases shares in the market or otherwise at above the offer price, then it shall increase its offer to not less than the highest price paid for the shares so acquired[4].

3. The Committee can find no compelling reason why an offeror should be prevented from purchasing shares in the market during the course of a take-over bid, particularly if, in the case of a partial bid, the recommendation of the Committee in section 3 of chapter 12 are implemented.

4. The Committee, however, does have concern about the price that might be paid by the offeror or its associates in connection with market purchases during the bid period. There may be cases where the offeror will pay more than the value of its bid in order to secure a block of shares. The Committee feels that this is a matter that should be studied by the Ontario Securities Commission and the Toronto Stock Exchange with the ultimate objective of having the legislation provide that, if the offeror purchases shares in the market at a price higher than the value of the bid on the date of purchase, the price offered by the bid should be increased to such price. The Committee is aware that any such provision would depend for its effectiveness on a requirement that the offeror report all purchases, including price, to either the Securities Commission or the Stock Exchange. The Committee recommends this matter be given further study by those responsible for the financial markets. Such a study would, in the opinion of the Committee, indicate the changes which should be made in the legislation.

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1. Rule 10b-13 of the General Rules and Regulations under the United States Securities Exchange Act of 1934.
2. The City Code, Rule 31.
3. The City Code, Rule 31.
4. The City Code, Rule 32.

CHAPTER 17

Take-Over Bids

Compulsory Acquisition and Compulsory Purchase

1. The legislation of certain jurisdictions in Canada affords an offeror corporation in connection with a take-over bid the opportunity to acquire 100% of the shares of the offeree corporation of the class involved in the take-over bid where pursuant to the bid the offeror corporation has acquired 90% of such shares. This right is given by the Canada Corporations Act[1] and by the relevant Companies Acts of the Provinces of Alberta[2], British Columbia[3], Nova Scotia[4], Quebec[5] and Saskatchewan[6]. The right existed in Manitoba but was dropped when this Province a few years ago adopted a new Companies Act. The right has never existed in Ontario nor, so far as the Committee is aware, does it exist in the United States. Bill C-213, an Act respecting Canadian business corporations, retains the right of compulsory acquisition but provides for a substantially different procedure for the exercise of the right[7].

2. The so-called right of compulsory acquisition would appear to have had its origin in England as a result of a recommendation of the so-called Greene Committee[8]. This recommendation led to the enactment of section 155 of the Companies Act 1929, which is now found in section 209(1) of the English Act. Weinberg gives the following reasons for the justification of compulsory acquisition provisions[9].

> "The theoretical justification for a provision of this nature is that, by and large, take over bids make for economic progress and a bid which receives overwhelming support should be facilitated by the law. The Greene Committee gave as its reason for recommending the section the desirability of preventing the "oppression of the majority by the minority" which results if a small minority can block a take-over bid, either in hope of exacting some extra payment by withholding approval or through lack of real interest. To this may be added the fact that, even if there is no opposition or apathy, 100 per cent acceptance is seldom possible because of untraceable shareholders and executors and trustees who do not have authority, or are at the time not yet clothed with power, to accept the bid. Moreover, the objection in principle to expropriation of property rights is tempered in modern conditions by the impersonality of much shareholding.".

3. In recognition that the position of a small minority of shareholders in a corporation which, following a take-over bid, had become a subsidiary as a result of the bid was not entirely satisfactory, there was included in the

English Act, implementing a recommendation of the Cohen Committee, section 209(2) giving minority shareholders locked in as a result of a take-over bid a corresponding right to compel the offeror corporation to acquire their shares if the offeror corporation had acquired 90% or more of the shares as a result of the bid. This section, in effect, gives the small minority protection against being locked in if the offeror corporation proposes not to invoke the compulsory acquisition provisions. However, unlike the compulsory acquisition provision which provides that the offeror corporation may acquire on the terms of the bid, the compulsory buy-out provisions provide that the price at which the minority is bought out may be on the terms of the bid, or such other terms as may be agreed or as the court on the application of either the transferee company or the shareholder thinks fit to order. Of the jurisdictions in Canada, which give the right of compulsory acquisition none, except British Columbia, has afforded the corresponding right in the English Act enabling the minority to require that their shares be purchased.

4. The sections of the legislation in many of the jurisdictions in Canada which afford the right of compulsory acquisition present difficulties in interpretation. In commenting on what was then section 124 of the Dominion Companies Act, Rand J. said[11] "The language of this section, which appears within a fasciculus headed "Arrangements and Compromises", may have been clear to the draftsman, but I confess that it presents to me many difficulties of construction.". It seems to the Committee that the right should arise only in connection with a take-over bid and despite the difficulty in language this is the context in which it has been considered by the Courts and it is in this context that this chapter has proceeded. A detailed analysis of the relevant legislation of each jurisdiction which affords the right of compulsory acquisition would in the opinion of the Committee serve no useful purpose in the report; it appears sufficient to summarize such provisions in general terms as follows:

(i) compulsory acquisition is available where within four months after the making of a take-over bid, the offer has been approved by the holders of nine-tenths in value of the shares of the target corporation;

(ii) in such circumstances the offeror may, at any time within two months after the expiration of the said four month period, give notice to any dissenting shareholder that it desires to acquire his shares;

(iii) when such a notice is given, the offeror (unless on an application made by the dissenting shareholder within one month from the date on which the notice was given, the court thinks fit to order otherwise) is entitled and bound to acquire those shares on the

terms on which, under the take-over bid, the shares of the accepting shareholders are to be purchased by the offeror.

(iv) the purchase price and terms are those under which the accepting shareholders are to sell their shares to the offeror;

5. With respect to the right of the minority to require the offeror corporation to purchase their shares, the English Act provides in effect that where pursuant to a take-over bid shares are transferred to the offeror and those shares together with any other shares of the offeree corporation held by or by a nominee for the offeror or its subsidiaries comprise or include nine-tenths in value of the shares of the offeree corporation or of any class of those shares, the offeror must within one month from the date of transfer give notice of the fact to the holders of the remaining shares and any such holder may within three months from the giving of such notice require the offeror corporation to acquire his shares.

6. The Committee has considered whether or not in connection with a take-over bid a right of compulsory acquisition and a corresponding right to the minority to require the offeror corporation to purchase their shares should be afforded in respect of Ontario corporations. Discussions which the Committee had with representatives of the English financial community where the compulsory acquisition provision has been in force for over 40 years indicated a general consensus among that community that such provisions were desirable, principally as a means of acquiring shares of shareholders who had lost interest or could not be traced or lacked authority to sell. In their view, compulsory acquisition was a means of "cleaning up the book keeping". There is perhaps a more compelling reason which would favour the introduction of compulsory acquisition provisions. It is not uncommon during the course of a take-over bid for a person to acquire shares of the target corporation in the face of the bid and in the expectation that he will be left in a minority position, hopefully as part of a very small minority. Such person then expects during the course of time to exact a higher payment for the shares acquired by him on the basis that, if the minority is small enough, the offeror corporation will want to eliminate it, particularly if the offeror corporation wants in some way and for a proper business reason to integrate the operations of the target corporation with its own. This may be the "oppression of the majority by the minority" referred to in the Greene Committee Report.

7. The right of the minority in a take-over bid to require the offeror corporation to purchase their shares under certain circumstances is in the view of the Committee a right which should be extended in Ontario. While such right might appear to give the minority a second chance at the offer, there may have been valid reasons in the first instance why the minority did not accept the offer and they should be afforded a second opportunity of extricating themselves from the position of a small minority.

8. The Committee therefore recommends that the Act be amended to provide for the right of compulsory acquisition following a take-over bid and to provide the minority with the right to compel the offeror corporation to purchase their shares. It is significant in the view of the Committee that the new Companies Act in the Province of British Columbia retains the right of compulsory acquisition and, for the first time, also affords the minority the right to require an offeror to purchase their shares. It is also of interest to note that Bill C-213 retains the right of compulsory acquisitions, but provides a completely different procedure for its exercise.

9. The Committee has considered the percentage of shares, the acquisition of which should give rise to the right of compulsory acquisition. It is obvious that the percentage must be high in order to establish the fact that the take-over bid has met with a high level of acceptance and that it is fair under the circumstances that the right of compulsory acquisition should be afforded. In all cases where the right of compulsory acquisition is given, a 90% level of acceptance must be reached. The Committee has concluded that this is an appropriate percentage. It should be made clear in the legislation that shares beneficially owned by the offeror corporation or any of its affiliates do not count in determining if the required percentage has been reached and that the right of compulsory acquisition exists only when the offeror has acquired pursuant to a take-over bid 90% of the shares held by shareholders other than the offeror and its subsidiaries or affiliates.

10. The Committee is of the view that the following provisions should be applicable in connection with the right of compulsory acquisition.

(a) It should not be necessary for the take-over bid to remain open for acceptance for any specified period of time other than the minimum period prescribed in section 82.1 of The Securities Act.

(b) To exercise the right of compulsory acquisition the take-over bid must have been accepted, within 120 days after the date of the bid, by the holders of 90% of the shares of any class of shares to which the take-over bid relates.

(c) If the take-over bid is made for more than one class of shares, it should be considered to be a separate bid for each class of shares involved.

(d) To exercise the right of compulsory acquisition, the offeror must send by registered mail within 60 days after the termination of the bid, but in any event not later than 180 days after the date of the bid, a notice to each offeree who has not accepted the bid stating that the holders of more than 90% of the shares or class of shares, as the case may be, to which the bid relates have accepted the bid and that the offeror desires to acquire the shares held by such non-accepting offerees.

(e) Upon the giving of such notice, the offeror is entitled and bound to acquire the shares of the non-accepting offerees at the price and on the terms set forth in the bid unless the Court, on application by the person to whom the notice was given, made within 60 days from the date of the notice, orders otherwise.

(f) The Court should be empowered, upon any such application being made to it, to vary the price or terms upon which the shares of the non-accepting offeree are to be acquired.

(g) Within 60 days after the giving of the notice referred to in clause (d) the offeror shall pay to the offeree corporation the money or other consideration to be paid to all non-accepting offerees who have not made application to the Court and within 15 days after final determination by the Court the offeror shall pay to the offeree corporation the consideration or other price determined by the Court in respect of non-accepting offerees who have made application to the Court and whose shares are to be acquired.

(h) The offeree corporation shall be deemed to hold in trust for the non-accepting offerees the money or other consideration it receives under clause (g) and should be required to deposit all money in a separate account in a bank or other deposit taking institution and to place any other consideration received by it in the custody of a bank or other depository.

(i) The offeree corporation, upon receipt of the money and other consideration referred to in clause (g), should be required to notify each non-accepting offeree that:

  (i) it has received the money or other consideration referred to in clause (g);

  (ii) the shares of such non-accepting offeree have been cancelled;

  (iii) the offeree corporation will or will cause to be paid to the non-accepting offeree the money or other consideration to which such non-accepting offeree is entitled forthwith upon receipt by the offeree corporation of share certificates representing the shares of the non-accepting offeree.

(j) Concurrently with the giving of the notice referred to in clause (i), the offeree corporation shall transfer to the offeror the shares of the non-accepting offerees and issue to the offeror a share certificate in respect of such shares.

11. The right of the minority to require an offeror corporation to purchase their shares should arise when an offeror corporation pursuant to a take-over bid becomes the beneficial owner of 90% of the shares of a corporation including in such 90% any shares beneficially owned by an affiliate of the offeror. The offeror corporation should be required within

30 days from completion of the take-over bid to notify those shareholders who have not accepted the bid that, together with shares beneficially owned by the offeror corporation and its affiliates, it is the beneficial owner of 90% of the shares of the offeree corporation. The minority shareholders should then have a period of 30 days within which to notify the offeror corporation that they require the offeror corporation to purchase their shares either at the price at which the take-over bid was made or for the fair value thereof. Such fair value should be established by the court on application by the offeror corporation or, failing such application by the offeror, by the shareholder concerned. The offeror corporation should not be required to make payment of the consideration until the minority shareholders who have elected to require the offeror corporation to purchase their shares have surrendered to the offeror corporation the share certificates representing such shares properly endorsed for transfer.

1. R.S.C. 1970, c. C-32, s. 136.
2. R.S.A. 1970, c. 60, s. 153.
3. S.B.C. 1973, c. 18, s. 276.
4. R.S.N.S. 1967, c. 42, s. 119.
5. R.S.Q. 1964, c. 271, s. 48.
6. R.S.S. 1965, c. 131, s. 189.
7. Bill C-213, an Act respecting Canadian business corporations, s. 195.
8. Company Law Reform Committee (1926): Cmd. 2657.
9. Weinberg, Take-overs and Mergers, third edition, p. 189.
10. S.B.C. 1973, c. 18, s. 276 (9).
11. Rathie v. Montreal Trust Company et al (1953) 2 S.C.R. 204 at 212.

CHAPTER 18

The Shareholders Appraisal Remedy

1. Section 100 of the Act confers upon a shareholder of a corporation that is not offering its shares to the public and who has voted against the confirmation of a resolution leading to the corporation taking any of the actions set out in that section the right to require the corporation to purchase his shares. Section 100(1) of the Act, which confers this right, reads as follows:

> "100(1) If, at a meeting of shareholders or of any class of shareholders of a corporation that is not offering its shares to the public,
>
> (a) a resolution passed by the directors authorizing the sale, lease, exchange or other disposition of all or substantially all the property of the corporation is confirmed with or without variation by the shareholders;
>
> (b) a resolution passed by the directors authorizing an amendment to the articles to delete therefrom a provision restricting the transfer of the shares of the corporation or of any class thereof is confirmed with or without variation by the shareholders;
>
> (c) a resolution approving an agreement for the amalgamation of the corporation with one or more other corporations is confirmed by the shareholders; or
>
> (d) a resolution passed by the directors under section 199[1] is confirmed by the shareholders,
>
> any shareholder who has voted against the confirmation of the resolution may within ten days after the date of the meeting give notice in writing to the corporation requiring it to purchase his shares.".

This is the so-called appraisal remedy for dissenting shareholders which in effect, under the circumstances set out in the statute, gives the dissenting shareholders a "put" against the corporation.

2. Section 100 of the Act first became the law of Ontario in The Corporations Act, 1953 as a result of a recommendation of the Select Committee of the Legislature, appointed in 1952, which reads as follows:

> "We are of the opinion that protection should be given to a shareholder of a private company who has voted against authorizing a sale of the assets of that company or against a conversion of such company into a public company, by requiring private companies, in either case, to purchase the shares of the dissenting shareholder if he so requires. We considered the position of dissenting shareholders of public companies and particularly the provisions for their protection contained in The Com-

> panies Act of Great Britain and in some of the Corporations Acts of certain States of the United States and in the model Act prepared by a committee of the American Bar Association. While we recognize that there is considerable merit in these provisions we do not feel that we should recommend the adoption of legislation requiring majority interests to purchase the interest of the minority in all similar cases. Our recommendations therefore are confined to minority shareholders of private companies as mentioned above.".

The remedy was available in the case of a private company only until the enactment of The Business Corporations Act. With the abolition of the distinction between private and public corporations by the Act, the remedy is now available in the case of "corporations which are not offering their *shares* to the public". Having regard to the provisions of section 1(9) of the Act which sets out the circumstances in which a body corporate is deemed to be offering its securities to the public, this change has undoubtedly broadened considerably the number of corporations to which the section now applies.

3. The Committee has considered whether or not the section should be enlarged to all corporations and, if so, what events should give rise to the appraisal right. It has reviewed the situation in the United Kingdom and the United States and has attempted to determine the effect, on both shareholders and the corporation, if the right is so extended.

4. The appraisal remedy exists in some form in fifty-two of the States of the United States, the lone exception being West Virginia. With the exception of a merger or consolidation, which seems to be a triggering transaction in all of the States which afford the remedy, the type of corporate action which gives rise to the availability of the remedy varies considerably. In some States a sale of substantially all of the assets of a corporation is a triggering transaction, in others certain charter amendments give rise to the remedy. Except for merger or consolidation, no common pattern emerges.

5. The United Kingdom appears to allow the appraisal remedy only in one situation. Section 287 of the English Act provides, in effect, that, where a corporation is proposed to be, or is in the course of being, wound up altogether voluntarily and the whole or part of its business or property is proposed to be transferred or sold to another corporation, the liquidator of the first mentioned corporation may, with the sanction of a special resolution of that corporation, receive, in compensation or part compensation for the transfer or sale, shares for distribution among the members of the transferor corporation; if any member of the transferor corporation who did not vote in favour of the special resolution expresses his dissent, he may require the liquidator either to abstain from carrying the resolution into

effect or to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by the section. The remedy so afforded is not confined to private corporations. This is a situation which would not appear to be one which gives rise to the appraisal remedy in the United States. The appraisal remedy may also be given in England indirectly by section 208 of the English Act, in connection with a compromise or arrangement proposed for the purposes of or in connection with a scheme for the amalgamation of two or more corporations. Under this section the court may by the order sanctioning the compromise or arrangement or by any subsequent order make provision, among other things, for the provision to be made for any persons, who within such time and in such manner as the court directs, dissent from the compromise or arrangement. The Committee understands that this is a rarely used power in the nature of an appraisal remedy.

6. Certain rights are also afforded in the United Kingdom in the case of a take-over bid, but these are not in the nature of an appraisal remedy. Section 209(2) of the English Act provides, in effect, that, where pursuant to a take-over bid a company acquires, together with shares already held by it or its nominee, nine-tenths in value of the shares of the target corporation, the holders of the remaining one-tenth may require the corporation making the bid to acquire their shares on the terms set out in the section.

7. The appraisal right is virtually unknown in Canada. Apart from Ontario, which gives appraisal rights in the case of corporations not offering their shares to the public, Alberta and Newfoundland grant appraisal rights only under the limited circumstances set out in section 287 of the English Act. Bill C-213, an Act respecting Canadian business corporations, would grant an appraisal right under circumstances substantially similar to those now permitted under the Act, but not limited to private corporations. Should then appraisal rights be granted to shareholders of all corporations incorporated in Ontario?

8. The United States is the haven of the appraisal remedy. It is idle to speculate on the reasons which may have led to the development of the appraisal right.[2] It is more important to consider the effect of such a right on the corporation concerned and its shareholders. Most of the corporation statutes in the United States provide that the dissenting shareholder is entitled to receive the "value" or the "fair value" of his shares. In the case of the shares of corporations listed on a stock exchange or actively traded in the over the counter market, what is such value? The experience in the United States would seem to indicate that the courts, in most instances, have refused to go beyond an enquiry as to the market price of the stock on the date determined to be relevant.[3] Where the shares of a corporation are not actively traded, or there is no market at all, the determination of value or fair value is more difficult and a court must then come up with its

own estimate of value using whatever techniques for value it deems appropriate. If, in the case of a corporation whose shares are actively traded, the criterion of value or fair value is the price put on the shares by the market, one may question the value of an appraisal remedy except perhaps in the situation where the market has taken a sudden drop in reaction to the proposed transaction. While in theory the appraisal remedy may, in the case of shares which are actively traded, seem to give dissenting shareholders the benefit of an independent valuation, it is extremely doubtful that courts in Canada would do more than seems to have been the case in the United States, i.e., accept the value placed on the stock by the investing public.

9. The existence of an appraisal remedy can be a serious matter from the point of view of the corporation. In the first place, the corporation will never know in advance how many dissenters, if any, there will be in respect of a transaction which gives rise to the remedy. Even a relatively few dissenters might cause a severe cash squeeze if the transaction were proceeded with and the dissenters paid out. If a large majority of shareholders voted in favour of the transaction and a small number voted against, the cash requirements to pay off the dissenters may be such that the transaction ceases to be economically sound and might have to be called off. This would again appear to result in the oppression of the majority by the minority.

10. Those who argue in favour of the appraisal remedy mainly point to the fact that the taking of a corporate action which may lead to the appraisal remedy results in a fundamental change in the nature of the investment of the shareholder and that in such circumstances the unwilling minority should not have to abide by the decision of the majority and be content with an altered investment. There are, however, many factors, not the subject of appraisal rights in the United States or anywhere for that matter, which may change or have a significant effect on the nature of the investment of a shareholder. Some of these factors may be external, some internal, but the fact they have not been brought about by shareholder action seems to be the determining factor—not the fact the investment of the shareholder has been affected. No jurisdiction gives an appraisal right to trade creditors or holders of debt securities of a corporation (although the holders of such debt securities may derive some comfort from the instrument under which such securities may have been issued) even though they may be affected in the same manner as shareholders.

11. The Committee has decided that, on balance, it should not recommend the extension of the appraisal remedy to shareholders of a corporation whose shares are being offered to the public. In the view of the Committee the determining factor on which an appraisal remedy, if it should be granted at all, should rest is the presence or absence of a market. In the

case of the shares of a corporation which are actively traded, the remedy would not appear to be any more effective than if the shareholder were to sell his stock in the face of a triggering transaction and certainly not persuasive enough to compensate for the cash drain which may be caused a corporation, to the possible detriment of the corporation, its creditors and the majority or the possibility that a transaction might have to be called off, because of the cash drain in meeting appraisal rights, to the detriment of the majority of shareholders who had voted in its favour. The Committee agrees with the conclusion reached by Bayless Manning in his article on the subject where he concluded "Appraisal should be considered an economic substitute for the stock exchange and its use should be limited to situations in which the exchange, or some kind of a reasonable market, is not available."[4] The Committee has, accordingly, concluded that the rights granted by section 100 of the Act should not be extended to a corporation whose shares are being offered to the public.

12. Section 100 of the Act, in dealing with the procedure for the exercise of the appraisal right in those cases where it is available and which the Committee recommends should be retained, is in the opinion of the Committee, deficient in a number of respects. The procedure does not deal with a number of problems: when does a shareholder claiming the appraisal right cease to be a shareholder; the position of such a claimant with respect to other creditors; the relevant date as of which value is determined; and the steps that should be taken by the corporation and the dissenter in the determination of value. The Committee recommends that the procedure set out in Appendix D should govern the exercise of appraisal rights and the results that flow therefrom.

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1. Section 199 of the Act provides as follows:
   "(1) A corporation may, if authorized by a special resolution, by the Minister and by the laws of any other jurisdiction, apply to the proper officer of that other jurisdiction for an instrument of continuation continuing the corporation as if it had been incorporated under the laws of that other jurisdiction.
   (2) The corporation shall file with the Minister a notice of the issue of the instrument of continuation, and on and after the date of the filing of the notice this Act ceases to apply to that corporation.
   (3) This section applies only in respect of a jurisdiction that has legislation in force that permits bodies corporate incorporated under its laws to apply for an instrument of continuation under the laws of Ontario.".
2. For a discussion of the possible reasons for the development of the appraisal remedy in the United States reference is made to the article "The Shareholder's Appraisal Remedy: An Essay for Frank Coker" by Bayless Manning, 72 Yale Law Journal, 223.
3. Manning op. cit. p. 232 and the authorities there cited.
4. Manning op. cit. p. 261.

CHAPTER 19

Financial Forecasts

1. In its consideration of the information which is required to be furnished or should be furnished to shareholders in connection with a business combination, the Committee reviewed the possibility of permitting or requiring a financial forecast to form part of such information. Shareholders should be furnished with sufficient information on which they can base a reasoned judgment and, in the case of a take-over bid in particular, it appeared to the Committee that some information, at least of the short term prospects of the target corporation and possibly also of the offeror corporation, would be relevant information to assist a shareholder in determining whether or not to accept or reject the bid. This is information that is probably known to the directors and if so should it not also be made available to the shareholders? The Committee also considered the desirability of a more general use of financial forecasts as a means of providing more investor disclosure. The use of financial forecasts is one which is gaining more and more consideration. Many articles have been written in recent years on the possible use of financial forecasts and the United States Securities and Exchange Commission has recently conducted hearings on this matter.

2. The attitude in Canada and the United States on the use of financial forecasts would until now appear to be quite different from the view which prevails in England, particularly with respect to prospectuses and take-over bids. The Regulations under The Securities Act provide that estimates of future earnings shall be identified as such and shall be included in a prospectus only with the permission of the Director and that, where an estimate of future earnings is included in a prospectus, the name of an auditor or accountant shall not be associated with the estimate.[1] While the Regulations refer specifically to a prospectus, it would appear that the same situation would exist with respect to the inclusion of an estimate of future earnings in a share exchange take-over bid circular.

3. In England, a forecast of some kind must be published in a prospectus when the corporation is quoted or is seeking a quotation on the London Stock Exchange. One of the requirements of the London Stock Exchange with respect to a prospectus is the inclusion of a statement as to the financial and trading prospects of the corporation together with any material information which may be relevant thereto. This requirement usually results in a statement with respect to the pre-tax profits of the corporation for its current fiscal year. The auditors of the corporation are not required to report on any such statement appearing in a prospectus but it is assumed that, since the auditor is required to consent to the publication of his report

on prior years' financial statements included in the prospectus, he would withhold his consent if he was dissatisfied with the forecast. This may be all the more the case in view of the requirement of the London Stock Exchange that the report by the auditors of the corporation, among other things, relate to any other matters which appear to the auditors to be relevant having regard to the purpose of the report.

4. The City Code which governs take-over bids neither requires not prohibits the inclusion of a financial forecast in the take-over bid documents. The Code provides that, if a profit forecast appears in any document addressed to shareholders in connection with an offer, the assumptions, including the commercial assumptions, upon which the directors have based their profit forecasts must be stated in the document and that the accounting bases and calculations for the forecasts must be examined and reported on by the auditors or consultant accountants and any financial adviser mentioned in the document. The accountants' report and that of the financial adviser, if any, must be contained in the document and be accompanied by a statement that the accountants and advisers have given and not withdrawn their consent to publication.[2]

5. There seems little doubt that the future prospects of a corporation are a significant factor in investment decision. It is not so much the historical financial results of a corporation which compel an investor to make a decision but rather the prospects of that corporation for the future. Various informal and unofficial forecasts are in fact publicized in apparent recognition of this fact. The annual reports of most corporations usually contain some statement with respect to the future of the corporation. These statements may not involve figures but they are none the less a form of forecasting. Many investment dealers circulate material to their clients which contain an estimate of earnings of corporations reviewed. Such estimates may be based on information which the investment dealer has obtained from management or may simply result from the knowledge of a financial analyst of the economic environment and the industry being evaluated. The financial analyst may not have knowledge of actual plans of management. The problem with such forecasts is that they are not available equally to all and seldom disclose the underlying assumptions.

6. Those who argue against a requirement for financial forecasting point out, among other things, that such forecasts must by their very nature be inaccurate at the best, that investors would put undue reliance on forecasts, that added costs would be incurred in preparing forecasts and having them independently reviewed and that a forecast could be detrimental to a corporation since not only will it inform investors but also competitors. The Committee is of the view, however, that the disadvantages of financial forecasting are outweighed by the advantages. The Committee is in general agreement with the statement made in the Report of the

English Panel on Take-overs and mergers for the year ended March 31, 1970 which stated:

> ". . . The Panel believes that directors' opinions on the immediate future profitability of a company are the most single significant element in the formation of a decision to invest or to disinvest in that company and if official forecasting were to be forbidden the inevitable consequence would be that unofficial forecasting would grow up in its place. Thus, as happens now in some overseas markets, uncorroborated statements for which no one is answerable would pass by word of mouth to selected shareholders."

We have, in fact, unofficial forecasting now and the Committee is of the view this should be put on a more formal basis.

7. If financial forecasting is to be required, it seems obvious that, if such forecasts are to be of maximum advantage, they must in some manner be independently reviewed. In England this seems to be a function which is carried out by the accounting profession, which has established its guidelines for this purpose. Assuming that proper guidelines can be developed in Canada, it seems to the Committee that this is a function which could well be undertaken by chartered accountants.

8. The Committee is aware that there will be problems involved in the institution of a system of financial forecasting. Some of the problems which will be presented relate to the form and content of a financial forecast, the period to be forecast, the extent of the detail which should be included in a forecast, the up-dating and revising of forecasts, the standards to be followed by the accounting profession with respect to reporting on forecasts, and the extent of the liability which an accountant may have in relation to his report on a forecast. These are matters which will require considerable thought and should be considered by those with expertise on the subject.

9. The Committee therefore recommends, having regard to its view of the desirability of financial forecasts, that the Ontario Securities Commission institute a study of this matter with the accounting profession and members of the financial community with a view to developing necessary guidelines and regulations which will require financial forecasts reported on by the auditors of a company.

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1. R.R.O. 1970, Regulation 794, as amended, sections 41 and 42.
2. The City Code, rule 16.

CHAPTER 20

Securities Act Exemptions for Business Combinations

1. The Securities Act exempts from the registration and prospectus requirements of that Act a statutory amalgamation or arrangement, a merger or consolidation (in the United States sense), a take-over bid, an offer to purchase shares by way of private agreement with fewer than fifteen shareholders and an offer to purchase all the shares in a private company.[1] These exemptions cover the various methods of effecting a business combination except one.

2. If two corporations wish to effect a business combination by the sale of all of the assets of one corporation to the other in exchange for securities of the purchasing corporation which are to be distributed to the shareholders of the selling corporation, the transaction is only exempt if the selling corporation agrees to hold the securities received by it on the sale of its assets for investment only and not with a view to resale or distribution and if the fair value of the assets sold by it is not less than $100,000.[2,3] It is difficult to see how the selling corporation can so agree if, in fact, the transaction contemplates the distribution of the securities received to the shareholders of the selling corporation and, in any event, the distribution would have to be postponed for at least the period of time (whatever this may be) which the selling corporation would have to hold the securities received in order to evidence its "investment intent". When a corporation sells all of its assets for securities of another corporation and proposes to distribute those securities to its shareholders as part of a winding up, the result for all practical purposes is a merger, but since the selling corporation does not lose its existence by operation of law under a statutory procedure, the exemption available in section 19(1)9(b) of The Securities Act is not available.

3. The basis for the various exemptions relating to business combinations would appear to be that the information furnished to shareholders, in the form of the information circular in the case of an amalgamation or arrangement and the take-over bid circular in the case of a share exchange take-over bid, is sufficient to permit the shareholders to form a reasoned judgment concerning the transaction. The same reasoning is also applicable in the case of a business combination effected by a sale of all of the assets of one corporation for securities of another which are to be distributed to shareholders of the selling corporation, at least in those circumstances where the shareholders of the selling corporation approve the transaction.

4. The Committee therefore recommends that section 19(1)9b of The Securities Act be amended to the extent necessary to provide for an exemp-

tion from the registration and prospectus requirements of that Act in the case of the sale by a corporation of all or substantially all of its assets where the sale is authorized by the shareholders of the selling corporation and the consideration for the sale consists in whole or in part of securities of the purchasing corporation which are to be distributed to the shareholders of the selling corporation.

1. The Securities Act s. 19(1)9, s. 19(1)9a, s. 58(1).
2. Section 19(1)9b of The Securities Act provides
   "19(1) Subject to the regulations, registration is not required in respect of the following trades
   9b. A trade in a security by a company as consideration for a portion of or all of the assets of any person, other than an individual, or any company who agrees to hold the securities for investment only and not with a view to resale or distribution, if the fair value of the assets so purchased is not less than $100,000.".
   Section 58(1)(c) of The Securities Act exempts a trade referred to in Section 19(1)9b from the prospectus requirements of the Act.
3. Section 19(1)8ii of The Securities Act exempts from registration and section 58(1)(c) exempts from prospectus requirements "a trade in a security whether of its own issue or not that is distributed or issued by a company to holders of its securities as incidental to a bona fide reorganization or winding up of such company or distribution of its assets for the purpose of winding-up its affairs.".

CHAPTER 21

Tax Implications of Business Combinations

1. As the Committee has already noted, the tax implications of a business combination may have a significant influence on the method chosen to accomplish the combination. These tax implications arise not only under the Income Tax Act of Canada, but as well under The Corporations Tax Act and The Income Tax Act of Ontario. Each of the three methods examined by the Committee by which a business combination is effected leads to different tax results, not only for the corporations concerned but for their shareholders. The Committee appreciated that matters of taxation are not within its terms of reference, but nevertheless feels that its report would not be complete without at least a passing reference to the problems. Nor does the Committee consider itself in any way to be a "tax expert" and the tax implications of a business combination are stated only in the most general of terms to illustrate the different taxation results which flow from each type of combination. It is assumed in each case that an 'arms-length" transaction takes place.

2. If a business combination takes place as a result of the sale by one corporation of all of its assets to another for securities of the purchasing corporation which are to be distributed to the shareholders of the selling corporation, then (i) the selling corporation will be subject to recapture of capital cost allowance previously claimed on depreciable assets if the selling price of such assets is higher than undepreciated capital cost and the amount of such recapture will form part of its income subject to tax, (ii) the selling corporation will face a capital gains tax if the selling price of depreciable or other capital assets is higher than the higher of cost or V-Day value, whichever is applicable, (iii) if the selling price includes an amount attributed to goodwill, a specified percentage thereof must be included in the income of the selling corporation subject to tax, (iv) if the selling corporation has a tax loss carry forward it will remain with the selling corporation; it cannot pass to the purchasing corporation, (v) if the purchasing corporation has a tax loss, it can under certain circumstances be applied to reduce tax on earnings derived from the use of the purchased assets, (vi) the shareholders of the selling corporation, on distribution to them of the securities of the purchasing corporation, will have received a dividend to the extent the value of the securities of the purchasing corporation received exceeds, roughly, the paid up capital returned (subject to the right of the selling corporation to elect to pay a special tax of 15% on its 1971 undistributed income on hand, in which case all or part of the dividend may be "tax free" in the shareholders' hands, but such tax free dividend will reduce the cost base, thus possibly

increasing future capital gains taxes, (vii) the purchasing corporation will be entitled to claim capital cost allowance on that part of the purchase price attributable to depreciable assets, and (viii) if goodwill is purchased, the purchasing corporation will be entitled to deduct a certain percentage thereof for tax purposes.

3. The taxing statutes contain elaborate provisions which are applicable in the case of a statutory amalgamation. Briefly stated, these provisions in effect provide that the amalgamated corporation is a new corporation for tax purposes and that the amalgamated corporation takes the assets of each of the amalgamating corporations at their tax values to the amalgamating corporations. No recapture of capital cost allowance, disposition of capital assets or goodwill are regarded as having occurred and generally no immediate tax consequences arise to the corporation. However, if any of the amalgamating corporations had a tax loss to carry forward, this right is lost on amalgamation. Where the shareholders of an amalgamating corporation receive on the amalgamation not less than 25% in number or value of the common shares (as defined in the taxing statutes) of the amalgamated corporation, their capital gain or loss position with respect to the shares is carried through to the shares of the amalgamated corporation. In certain circumstances the "designated surplus" provisions may come into play resulting in normally tax-free inter-corporate dividends being taxed at 25% either at the time of the amalgamation or upon a later distribution to controlling corporate shareholders of the amalgamated corporation.

4. A successful take-over bid results in still different tax consequences. Since only the shares of the target corporation change ownership, and not its assets, there are no tax consequences to the target corporation except that, if the acquiring corporation acquires control (more than 50% of issued share capital having full voting rights) of the target corporation, the post-1949 earned surplus of the target corporation and its subsidiaries, if any, becomes "designated" and subject to 25% tax when paid to the controlling corporation as a dividend unless, with respect to 1950-1971 undistributed income, a special 15% tax is paid by the dividend-paying corporation in which case the dividend is tax free in the hands of the recipient, corporate or individual, but the cost base of the shares is reduced by the amount of the dividend thereby creating a possible future capital gains tax liability). If the target corporation has a tax loss carry forward, it is not automatically lost and may, under certain circumstances, continue to be available to it. The shareholders of the target corporation do not normally have available to them tax free rollover provisions which exist in the case of an amalgamation and, as a result, any capital gain or loss will usually be recognized for tax purposes as a result of acceptance by them of the take-over bid.

5. As a practical matter of rationalizing a business combination for operational purposes, more than one of the approaches may be involved. For example, a successful take-over bid may have to be followed by an amalgamation or transfer of assets in order to complete the combination. The Committee expresses its concern that the tax results of a business combination are so different and complex dependent upon the method used. The Committee recommends that this is a matter to be considered by the Ministry of Treasury, Economic and Intergovernmental Affairs and the Ministry of Revenue with a view to it receiving further study at both federal and provincial levels.

CHAPTER 22

Insider Trading

1. Both the Act and The Securities Act impose a liability on an insider of a corporation and on an associate or affiliate of such insider "who, in connection with a transaction relating to the (capital) securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities".[1] A double liability is imposed. The insider, associate or affiliate is liable to compensate any person for any direct loss suffered by such person as a result of the transaction, unless the information was known or ought reasonably to have been known to such person at the time of the transaction, and is accountable to the corporation for any direct benefit or advantage received by such insider, associate or affiliate as a result of the transaction.[2]

2. The insider trading provisions of the Act apply only to insiders of a corporation that is offering its securities to the public,[3] while the similar provisions of The Securities Act apply to insiders of a corporation as defined in Part X.[4] In the case of those corporations to which the provisions apply, insider is defined, in effect, to mean any director or senior officer of the corporation and any person who beneficially owns, directly or indirectly, or exercises control or direction over, equity shares of the corporation carrying more than 10 per cent of the voting rights attached to all equity shares for the time being outstanding.[5] Both Acts also provide that every director and senior officer of a corporation that is itself an insider of another corporation shall be deemed to be an insider of such other corporation.[6]

3. Unless a person is an insider or an associate or affiliate of an insider, as defined in the legislation, no liability will attach to such person under the legislation even though such person may have specific confidential information and trade on the basis of it. Professional advisers or consultants retained by a corporation, employees who are neither directors nor senior officers, and the vaguely defined group of persons sometimes known as "tipees" are all excluded from liability, unless they happen to be an associate of an insider[7]. In many cases such persons may be as much privy to confidential information as a director or senior officer and there would appear to be no reason, in the opinion of the Committee, why they should not be subject to the same liability. In this connection the Committee notes that the Canada Corporations Act extends the area of liability to include every person employed or retained by the corporation and its auditor.[8]

4. The Committee therefore recommends that both the Act and The Securities Act be amended to provide that the liability for insider trading be extended to include professional advisers or consultants retained by the corporation and employees of the corporation. If a satisfactory definition

of a "tipee" could be developed, and this may well present difficulties, the Committee would also recommend that such persons be made subject to insider trading liability. The Committee does not recommend that such expanded group be required to file insider trading reports. The approach adopted in Bill C-213, an Act respecting Canadian business corporations, commends itself to the Committee. That Bill contains two definitions of the term insider, one (the narrow one) for the purpose of determining who must file reports and the other (the broader one) for the purpose of determining who is subject to liability.

5. The Committee is also concerned that the present legislation is not sufficiently broad in the case of take-over bids and amalgamations. Directors and senior officers of an offeror corporation will have knowledge that a bid is about to be made and the terms of that bid. If the offeror corporation is not the beneficial owner of more than 10% of the equity shares of the offeree corporation, the directors and senior officers of the offeror will not be insiders of the offeree corporation. They may conceivably trade in the shares of the offeree corporation prior to the bid being made based on their knowledge of the terms of the bid. Similarly, directors and senior officers of the offeree corporation, armed with knowledge of the pending take-over bid, may trade in the securities of the offeror corporation, although this perhaps is a less likely possibility. In neither case would any liability attach under the present legislation. The same situation would appear to be applicable in the case of an amalgamation. Directors and senior officers of one of the amalgamating corporations, based on their knowledge of the proposed amalgamation, could trade in the securities of the other amalgamating corporation without liability. The Committee is satisfied that the provisions of the legislation imposing liability for insider trading should be enlarged further to cover the foregoing situations, particularly in the case of take-over bids where the value of the bid is usually higher than the market price of the shares of the offeree corporation.

6. The Canada Corporations Act contains provisions which are designed to extend insider liability by providing that, where a corporation becomes an insider of another corporation, the directors and officers of each corporation are deemed to have been insiders of the other corporation for the previous six months or for a such shorter period as he was a director or officer.[9] The inclusion of a similar provision in the Ontario legislation was considered by the Merger Study Committee. That Committee declined to extend insider trading liability under these circumstances on the basis that the members of the Committee were unable to satisfy themselves that such an extension would meet any need.[10] With respect, the Committee finds it is unable to agree with this conclusion of the Merger Study Report and feels that an extension of insider trading liability is necessary and warranted, not only in the case of take-over bids but also in the case of a statutory amalgamation. The Committee recommends that the Ontario

legislation contain a provision substantially similar to section 100.1(5) of the Canada Corporations Act but extended to cover the case of a statutory amalgamation.

7. The legislation imposing liability for insider trading is, to say the least, difficult. It provides a remedy but one may wonder how effective the remedy is. As noted in section 2 of this chapter, the remedy is given not only to the person who may have suffered direct loss as a result of the transaction but also to the corporation itself. A person seeking to enforce the remedy would appear to have to establish that the insider had specific confidential information, that he used such imformation for his own benefit or advantage and that such information, if generally known, might reasonably be expected to affect materially the value of the securities traded by the insider. Moreover, if the securities which are the subject of the transaction were purchased and sold through the facilities of a stock exchange, a person seeking to enforce the remedy would have the additional, and almost impossible, task of establishing that the insider was the vendor to him. One may well ask how a person is to assemble the required evidence to meet the conditions which will impose liability on the insider. Apart from the remedy which is given to a person who may have suffered direct loss, the insider is also accountable to the corporation of which he is an insider for any direct benefit or advantage received or receivable by him as a result of the transaction. In anticipation of the fact that a corporation might be reluctant to bring action against an insider for an accounting, the legislation has provided that, on the application of any person or company who was the owner of securities of the corporation at the time of the transaction complained of, the court may make an order requiring the Commission to commence or to continue an action in the name of and on behalf of the corporation to enforce the liability of the insider.[11] The person seeking such an order must establish to the satisfaction of the court that he has reasonable grounds for believing that the corporation has a cause of action and either that the corporation has refused or failed to commence an action within 60 days after receipt of a written request so to do or that it has failed to prosecute diligently an action commenced by it. The problem, here again, seems to be a matter of evidence. The person applying presumably must bring before the court at least sufficient evidence to satisfy the court there are reasonable grounds for an action. It would seem to the Committee that the Securities Commission may be the best equipped to secure the required evidence and in many cases it may very well be that the Commission may already have assembled the evidence. The Committee is of the view that both section 151 of the Act and section 114 of The Securities Act should be enlarged to give the Commission the right to apply to the court to obtain the required order.

1. The Act, section 150(1), The Securities Act, section 113(1). The bracketed word appears in The Securities Act but not in The Business Corporations Act.

2. The Act, section 150(1), The Securities Act, section 113(1).
3. See chapter 9, note 1, for the definition in the Act of when a body corporate is offering its securities to the public.
4. Part X of The Securities Act defines a corporation to mean a company
   "(i) that has issued equity shares that on or after the1st day of May, 1967 are distributed in the course of a distribution to the public, in respect of which a prospectus is filed with the Commission and a receipt therefor obtained, or
   (ii) any of whose shares are listed and posted for trading on any stock exchange in Ontario recognized by the Commission,
   other than
   (iii) a company incorporated by or under a general or special Act or the Legislature of a company to which Part II of The Corporations Act or The Business Corporations Act, applies, or
   (iv) a bank to which the Bank Act (Canada) applies;".
5. The Act, section 1(1)15., The Securities Act, section 109(1)(c).
6. The Act, section 1(6), The Securities Act, section 109(2).
7. The Act, section 1(1)3, defines "associate" as follows:
   " "associate", where used to indicate a relationship with any person, means,
   i. any body corporate of which such person beneficially owns, directly or indirectly, equity shares carrying more than 10 per cent of the voting rights attached to all equity shares of the body corporate for the time being outstanding,
   ii. any partner of that person acting by or for the partnership of which they are both partners,
   iii. any trust or estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity,
   iv. any spouse, son or daughter of that person, or
   v. any relative of such person or of his spouse, other than a relative referred to in subparagraph (iv), who has the same home as such person.".
   The Securities Act defines associate to the same effect (section 1(1)2).
8. The Canada Corporations Act, section 100.4(1).
9. The Canada Corporations Act, section 100.1(5) which provides:
   "(5) For the purposes of this section
   (a) where any other company becomes an insider of a company, every director or officer of the first mentioned company shall be deemed to have been an insider of the second mentioned company for the previous six months or for such shorter period as he was a director or officer of the first mentioned company, and
   (b) where a company becomes an insider of any other company, every director or officer of the second mentioned company shall be deemed to have been an insider of the first mentioned company for the previous six months or for such shorter period as he was a director or officer of the second mentioned company;".
10. Merger Study Report, section 7.35.
11. The Act, section 151, The Securities Act, section 114.

APPENDIX A

Extract from The Securities Act
Provisions Applicable to Take-over Bids

82. The following provisions apply to every take-over bid:

1. The period of time within which shares may be deposited pursuant to a take-over bid shall not be less than twenty-one days from the date thereof.
2. Any shares deposited pursuant to a take-over bid shall not be taken up and paid for by the offeror until the expiration of seven days from its date.
3. Any shares deposited pursuant to a take-over bid may be withdrawn by or on behalf of an offeree at any time until the expiration of seven days from its date, but where the terms of the take-over bid are varied before the expiration thereof the offeree shall have an additional seven days from the date of their receipt of the varied offer to withdraw any shares deposited pursuant to the take-over bid.
4. Where a take-over bid is made for less than all the equity shares owned by offerees, shares deposited pursuant thereto shall not be taken up and paid for by an offeror until the expiration of twenty-one days from its date.
5. Where a take-over bid is made for less than all the equity shares owned by offerees, the period of time within which shares may be deposited pursuant to the take-over bid, or any extension thereof, shall not exceed thirty-five days from the date of the take-over bid.
6. Where a take-over bid is made for less than all the equity shares owned by offerees, shares deposited pursuant to the take-over bid shall be taken up and paid for, if all the terms and conditions thereof not waived by the offeror have been complied with, within fourteen days after the last day within which shares may be deposited pursuant thereto.
7. Where a take-over bid is made for less than all the equity shares owned by offerees and where a greater number of shares is deposited pursuant thereto than the offeror is bound or willing to take up and pay for, the shares taken up by the offeror shall be taken up as nearly as may be *pro rata*, disregarding fractions, according to the number of shares deposited by each offeree.
8. Where the laws applicable to the company provide for a right of appraisal or acquisition, the offeror shall advise the offeree of his rights of appraisal and whether the offeror intends exercising any right of acquisition he may have.

9. Where the offeror intends to purchase securities in the market, his intention shall be set out in the take-over bid circular and, where the take-over bid is made for less than all of the equity shares owned by the offeree, he shall not reduce the number of shares he is bound or willing to take up under paragraph 7 by the number of shares purchased in the market.
10. The offeror shall not attach any conditions to the offer except the right to withdraw the offer if the offerees fail to tender the minimum number of shares the offeror is bound and willing to take up or where the action of the board of directors of the offeree company subsequent to the date of the offer materially changes the undertakings, assets or capital of the offeree company.
11. Where the offer is made for all of the equity shares owned by offerees, the offeror shall, at the expiration of thirty-five days from the making of the offer, take up and pay for the shares tendered at that time or abandon his offer.

APPENDIX B

Extract from The Securities Act
Contents of Take-over Bid Circulars

91. A take-over bid circular shall contain the following information:

1. The number, without duplication, and designation of any securities of the offeree company beneficially owned, directly or indirectly,
   (i) by the offeror,
   (ii) by an associate of the offeror,
   (iii) by each director and each senior officer of the offeror and their associates, and
   (iv) where known to the directors or senior officers of the offeror, by a person or company who beneficially owns, directly or indirectly, equity shares of the offeror carrying more than 10 per cent of the voting rights attached to all equity shares of the offeror for the time being outstanding,

   of, if none are so owned, a statement to that effect.

2. Where known to the directors or senior officers of the offeror, the number and designation of any equity shares of the offeree company traded by the persons or companies referred to in item 1 during the six-month period preceding the date of the take-over bid, including the purchase or sale price and the date of each such transaction.

3. Where the obligation of the offeror to take up and pay for shares under a take-over bid is conditional upon a minimum number of shares being deposited pursuant thereto, the particulars of such condition.

4. The particulars of the method and time of payment of the cash or other consideration to be paid for the shares of the offeree company.

5. A statement that any shares deposited pursuant to the take-over bid may be withdrawn by or on behalf of the offeree at any time until the expiration of seven days from its date.

6. Where the shares in the offeree company sought to be acquired pursuant to the take-over bid are to be paid for in whole or in part in cash, details of the arrangements that have been made by the offeror to ensure that the required funds are available to take up and pay for the shares of the offeree company deposited pursuant to the take-over bid.

7. Where reasonably ascertainable, a summary showing in reasonable detail the volume of trading and price range of the shares of the offeree company sought to be acquired pursuant to the take-over bid in the six-month period preceding the date of the take-over bid.

8. The particulars of any arrangement or agreement made or proposed to be made between the offeror and any of the directors or senior officers of the offeree company, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or as to their remaining in or retiring from office, if the take-over bid is successful.

9. The particulars of any information known to the offeror that indicates any material change in the financial position or prospects of the offeree company since the date of the last published interim or annual financial statement of the offeree company.

APPENDIX C

Extract from The Securities Act
Contents of Directors' Circular

96. A directors' circular shall contain the following information:

1. The number, without duplication, and designation of any securities of the offeree company beneficially owned, directly or indirectly, by each director and each senior officer of the offeree company and their associates and, where known to the directors or senior officers, by each person or company who beneficially owns, directly or indirectly, equity shares of the offeree company carrying more than 10 per cent of the voting rights attached to all equity shares of the offeree company for the time being outstanding or, in each case, if none are so owned, a statement to that effect.

2. A statement as to whether each director and senior officer of the offeree company and their associates, and, where known to the directors or senior officers, each person or company who beneficially owns, directly or indirectly, equity shares of the offeree company carrying more than 10 per cent of the voting rights attached to all equity shares of the offeree company for the time being outstanding, has accepted or intends to accept the offer in respect of any shares of the offeree company sought to be acquired.

3. Where a take-over bid is made by or on behalf of a company, the number, without duplication, and designation of any securities of the offeror beneficially owned, directly or indirectly, by each director and each senior officer of the offeree company and their associates and, where known to the directors or senior officers, by each person or company who beneficially owns, directly or indirectly, equity shares of the offeree company carrying more than 10 per cent of the voting rights attached to all equity shares of the offeree company for the time being outstanding.

4. The particulars of any arrangement or agreement made or proposed to be made between the offeror and any of the directors or senior officers of the offeree company, including particulars of any payment or other benefit proposed to be made or given by way of compensation for loss of office or as to their remaining in or retiring from office if the take-over bid is successful.

5. Whether any director or senior officer of the offeree company and their associates and, where known to the directors or senior officers, whether any person or company who beneficially owns,

directly or indirectly, equity shares of the offeree company carrying more than 10 per cent of the voting rights attached to all equity shares of the offeree company for the time being outstanding has any interest in any material contract to which the offeror is a party, and, if so, particulars of the nature and extent of such interest.

6. Where reasonably ascertainable, a summary showing in reasonable detail the volume of trading and the price range of the shares sought to be acquired pursuant to the take-over bid in the six-month period preceding the date thereof if such information is not disclosed in the take-over bid circular or if, in the opinion of the directors of the offeree company, such information is not adequately disclosed therein.
7. The particulars of any information known to any of the directors or senior officers of the offeree company that indicate any material change in the financial position or prospects of the offeree company since the date of the last published interim or annual financial statement of the offeree company.
8. The particulars of any other material facts not disclosed in the foregoing.

APPENDIX D

Suggested Procedure for Appraisal Rights

1. The notice of the meeting at which the transaction is to be proposed should refer to the right of the dissenting shareholder to claim appraisal of and payment for his stock and should describe briefly the procedure to exercise the right.

2. A shareholder would be considered as a dissenting shareholder if (i) he voted against the transaction at the meeting, or (ii) if prior to the meeting he filed with the corporation a written objection to the transaction and thereafter did not vote in favour of the transaction at the meeting. In the case of such a written objection, non-attendance and non-voting at the meeting would not extinguish the appraisal right.

3. A dissenting shareholder should be required to claim appraisal rights with respect to all shares registered in his name and held on behalf of any one beneficial owner.

4. A dissenting shareholder should be entitled to receive the fair value of the shares held by him in respect of which he dissents determined as of the day before the transaction is approved by the shareholders of the corporation (such a valuation date will eliminate the effect of the transaction on the fair value of the shares).

5. Within 7 days after the meeting of shareholders, the corporation should notify each dissenting shareholder as to whether or not the transaction has been approved and, if it has, the corporation should include in such notice an offer to purchase the shares of the dissenting shareholder. The notice should be accompanied by a copy of the last audited financial statements of the corporation.

6. Within 10 days from the receipt of the notice from the corporation, the dissenting shareholder, in order to preserve his right of appraisal, shall notify the corporation (i) that he continues to claim for appraisal and purchase of his stock and (ii) whether or not he accepts the corporation's offer. Such notice should be accompanied by the certificates representing the shares in respect of which appraisal is demanded so that such certificates may be endorsed with an appropriate notice that the shares represented thereby are subject to appraisal rights. The certificates would then be returned to the dissenting shareholder.

7. A dissenting shareholder who fails to give the notice referred to in Item 6 or fails to surrender his certificates with said notice for endorsement as aforesaid shall forfeit his appraisal rights.

8. If the dissenting shareholder does not accept the offer of the corporation and if the corporation and the dissenting shareholder are not able to agree on price within 30 days after the giving of the notice by the dissenting shareholder referred to in Item 6, then either the corporation or the dissenting shareholder may at any time within 90 days after the expiration of the said 30 day period apply to the court for a determination of the fair value of the shares.

9. The court should be empowered to appoint one or more appraisers to assist it to determine the fair value of the shares.

10. If neither the corporation nor the dissenting shareholder applies to the court within the 90 day period, the dissenting shareholder would lose his appraisal rights.

11. A dissenting shareholder would cease to have any of the rights of a shareholder other than to receive the fair value of his shares when he gives the notice referred to in Item 6 duly accompanied by his certificates. If as a result of inaction the appraisal right is lost, the dissenting shareholder would be restored to the status of a shareholder at the end of the 90 day period during which application to the court can be made.

12. No purchase of shares should be made if (i) the transaction in respect of which a dissenting shareholder objected is not carried out, or (ii) if the corporation is insolvent or payment would render it insolvent.

13. The dissenting shareholder should be entitled to his costs of the court proceedings unless the court finds that his refusal to accept the offer of the corporation was arbitrary, vexatious or otherwise not in good faith.

14. No shares of the dissenting shareholder should be purchased by the corporation unless all the shares of such dissenting shareholder can be purchased without violation of the condition referred to in clause (ii) of Item 12.

15. The position of a shareholder who has claimed the appraisal remedy should not be the same as that of creditors of the corporation; the claim of such a shareholder should rank after all other creditors. A shareholder should not, by the simple expedient of dissenting and claiming an appraisal right, be able to elevate his position.